(6)

No. 83-1249-CFX
Status: GRANTED

Title: John Cary Sims and Sidney M. Wolfe, Petitioners
v.
Central Intelligence Agency and William J. Casey, Director, Central Intelligence Agency

Docketed:
January 27, 1984

Court: United States Court of Appeals for the District of Columbia Circuit

Vice:
83-1075

Counsel for petitioner: Morrison, Alan B.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Jan 27 1984	G	Petition for writ of certiorari filed.
2	Mar 12 1984		Record filed.
3	Mar 12 1984		Certified original record & C.A. proceedings, - box, received.
4	Mar 14 1984		DISTRIBUTED. March 30, 1984
5	Mar 26 1984	P	Response requested. (Due April 25, 1984 - NONE RECEIVED)
7	Apr 25 1984		Order extending time to file response to petition until May 13, 1984.
8	May 18 1984		Brief of respondents CIA, et al. in opposition filed.
9	May 22 1984		REDISTRIBUTED. June 7, 1984
10	Jun 11 1984		Petition GRANTED. The case is consolicated with No. 83-1075, CIA v. Sims, and a total of one hour is allottec for oral argument.
			**********
13	Jul 16 1984		Order extending time to file brief of petitioner on the merits until August 15, 1984.
14	Aug 2 1984		Order further extending time to file brief of petitioner on the merits until August 22, 1984.
15	Aug 22 1984		Brief of petitioners John Carey Sims, et al. filed. VIDED.
17	Sep 21 1984		Order extending time to file brief of respondent on the merits until October 26, 1984.
18	Oct 22 1984		SET FOR ARGUMENT. Tuesday, December 4, 1984. This case is consolidated with No. 83-1075. (2nd case) (1 hour).
19	Oct 30 1984		Supplemental brief of petitioners John C. Sims, et al. filed. VIDED.
20	Nov 1 1984		CIRCULATED.
22	Oct 28 1984		Order further extending time to file brief of respondent on the merits until November 5, 1984.
23	Nov 5 1984	X	Brief of respondents CIA, et al. filed.
24	Dec 4 1984		ARGUED.

No 83 - 1249

IN THE

Supreme Court of the United States

October Term, 1983

JOHN CARY SIMS and SIDNEY M. WOLFE,
Petitioners,

v.

CENTRAL INTELLIGENCE AGENCY and
WILLIAM J. CASEY, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALAN B. MORRISON
(Counsel of Record)
PAUL ALAN LEVY
DAVID C. VLADECK

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

January 1984

CASILLAS PRESS INC - 1717 K STREET NW WASH DC 20036 - 223-1220

QUESTION PRESENTED

Did the court of appeals err by affirming, without explanation, the district court's decision to permit the Central Intelligence Agency to withhold the names of institutions at which MKULTRA research was conducted, even though the institutions themselves are not "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3), and even though the CIA failed to present any evidence to show that disclosure of the institutions would lead to identification of researchers?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1983

No.

JOHN CARY SIMS and SIDNEY M. WOLFE,
Petitioners,

v.

CENTRAL INTELLIGENCE AGENCY and
WILLIAM J. CASEY, DIRECTOR,
CENTRAL INTELLIGENCE AGENCY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

John Cary Sims and Sidney M. Wolfe, M.D., hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case. This petition is conditioned on the granting of the petition for a writ of certiorari filed by petitioners Central Intelligence Agency and William J. Casey, Director, Central Intelligence Agency, in No. 83-1075, which seeks review of the same judgment. Mr. Sims and Dr. Wolfe will file an opposition to that petition.

In the event that respondents' petition is denied, Mr. Sims and Dr. Wolfe do not request that the Court grant this petition.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 709 F.2d 95.* The opinions and order of the district court (Pet. App. 21a-34a) are not reported. An earlier opinion of the court of appeals (Pet. App. 35a-65a) is reported at 642 F.2d 562. One of the earlier opinions of the district court (Pet. App. 66a-72a) is reported at 479 F. Supp. 84; the other earlier opinion of the district court (Pet. App. 73a-97a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983 (Pet. App. 19a-20a). A petition for rehearing was denied on August 17, 1983 (Pet. App. 17a-18a). On November 9, 1983, the Chief Justice extended the time in which to file a petition for a writ of certiorari to December 15, 1983, and on December 5, 1983, the Chief Justice further extended the time to file a petition for a writ of certiorari to December 29, 1983. On that date, the Central Intelligence Agency ("CIA"), and William J. Casey, Director, Central Intelligence Agency filed a petition for a writ of certiorari, and the petition was received by counsel for petitioners in this action the following day. Pursuant to Rule 19.5 of the Rules of this Court, a cross-petition may be filed within thirty days of the receipt of a petition for a writ of certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

*"Pet. App." refers to the Appendix to the Petition for a Writ of Certiorari filed by petitioners Central Intelligence Agency and William J. Casey, Director, Central Intelligence Agency, in No. 83-1075, which seeks review of the same judgment.

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, provides, in relevant part:

> (b) This section does not apply to matters that are –
>
> (3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld....

Section 102(d)(3) of the National Security Act of 1947, 50 U.S.C. § 403(d)(3), provides in relevant part:

> . . . [T]he Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure....

STATEMENT OF FACTS

The procedural history of this case is given in the statement on pages 2-8 of the petition for a writ of certiorari filed in No. 83-1075. However, several additional points should be made with respect to the records that are at issue on this cross-petition, *i.e.*, records reflecting the names of the institutions at which MKULTRA research was conducted.

Petitioners argued before the court of appeals that the district court erred by allowing the CIA to withhold the identities of all institutions at which exempted researchers performed their subprojects. In making this argument, petitioners emphasized that there was no evidence to show that identification of institutions would lead to identification of researchers. Thus, they pointed out that the CIA had released the identities of 59 of the 80 institutions, which had consented to the release of their names, even though the identities of the researchers were still withheld. In addition, the record was clear that most of the institutions involved were major universities, such as Harvard University, Stanford University, and the Massachusetts Institute of Technology, and that these institutions had no knowledge that CIA-sponsored research was being conducted on campus. Pet. App. 74a. Moreover, the research was conducted twenty to thirty years ago. For these reasons, petitioners argued that it was highly unlikely that the disclosure of the institutions could lead to the revelation of the researchers.

However, the court of appeals' decision did not address this issue, let alone discuss how the agency could have met its burden of demonstrating *de novo* that the names of the institutions qualified as "intelligence sources." But its decision remanding the case to the district court for consideration of the researchers' status, and its statement that the district court's judgment is otherwise affirmed, indicate that the court implicitly affirmed the district court in this regard. In order to clarify this and other questions, petitioners sought rehearing, but the petition was denied without explanation.

REASONS FOR GRANTING THE WRIT

For the reasons that will be set forth in our opposition in No. 83-1075, that petition for a writ of certiorari should be

denied. If that petition is granted, however, the Court should also grant this cross-petition, so that it may review the entire judgment of the court of appeals.

In its decision, the court of appeals failed entirely to address one of the major arguments presented for review: whether the district court had erred in permitting the CIA to withhold the identity of any institution at which exempted researchers performed their research. Although this point was extensively discussed in the briefs filed by both parties, the court of appeals' opinion does not address it at all, creating the impression that it intended to affirm the district court on this issue. No explanation is given for the court's failure to afford petitioners a considered resolution of their appeal. Moreover, an additional effect of the decision is to deny the petitioners, the public, the agency, and the district court guidance on an important and recurring issue in Freedom of Information Act litigation — the extent to which an agency must prove that identification of a non-confidential entity will lead to disclosure of a confidential source. *See, e.g., Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982).

We do not ask this Court to decide whether this issue, standing alone, warrants the Court's consideration. However, if the Court determines to hear respondents' challenge in No. 83-1075 to the definition employed by the court of appeals in applying the term "intelligence source" in 50 U.S.C. § 403(d)(3) to the unique facts of this case, it should also review the issue raised here. The court of appeals' failure to provide any explanation of its apparent decision to permit the withholding of the names of institutions as "intelligence sources" should not stand, particularly since there was no evidence offered to show that identification of these institutions — which played no role in

the research, and which were generally unaware that CIA-sponsored research was being conducted at their institutions – would lead to the identification of exempt researchers.

CONCLUSION

If this Court grants the petition for a writ of certiorari in No. 83-1075, it should also grant this cross-petition. If the petition in No. 83-1075 is denied, this petition should also be denied.

Respectfully submitted,

ALAN B. MORRISON
(Counsel of Record)
PAUL ALAN LEVY
DAVID C. VLADECK

Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Petitioners

January 1984

No. 83-1249

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN CARY SIMS AND SIDNEY M. WOLFE, PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY AND WILLIAM J. CASEY, DIRECTOR OF CENTRAL INTELLIGENCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1249

JOHN CARY SIMS AND SIDNEY M. WOLFE, PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY AND WILLIAM J. CASEY, DIRECTOR OF CENTRAL INTELLIGENCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Cross-petitioners contend that the court of appeals erred in affirming the district court's ruling that the Central Intelligence Agency need not disclose the identities of institutions that employed researchers who served as intelligence sources for the Agency.

1. The facts and background of this case are recounted in our petition in No. 83-1075 (see 83-1075 Pet. 2-8). In brief, cross-petitioners filed suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking, among other things, the names of private researchers who performed research for the CIA in connection with a CIA project known as MKULTRA. Research for this project was performed by many individuals affiliated with institutions such as universities; cross-petitioners sought the names of both the individuals and the institutions.

In response, the CIA invoked Exemption 3 of the FOIA, which provides that an agency need not disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). The statute on which the CIA relied is Section 102(d)(3) of the National Security Act of 1947, which provides in part that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). The Agency contended that the researchers were "intelligence sources" and therefore exempt from disclosure under Exemption 3 and 50 U.S.C. 403(d)(3).

The United States District Court for the District of Columbia initially rejected the Agency's Exemption 3 claim (83-1075 Pet. App. 77a-79a). The court of appeals subsequently vacated the district court's ruling, propounded a definition of "intelligence sources," and remanded for reconsideration in light of that definition (*id.* at 35a-64a). The court of appeals' definition was as follows (*id.* at 50a):

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

On remand, the district court ordered the disclosure of the names of about half of the individual researchers and the institutions with which they were affiliated (83-1075 Pet. App. 21a-34a). The district court held that the identities of the other researchers were exempt from disclosure either because they had sought and received express promises of confidentiality from the Agency (*id.* at 26a) or because they had engaged in other intelligence activities, apart from

MKULTRA, for the CIA (*id.* at 31a). The district court also ruled that the Agency need not disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure (*id.* at 27a, 34a).[1] This is the ruling to which cross-petitioners now object.

Both sides appealed, and the court of appeals reversed in part and affirmed in part (83-1075 Pet. App. 1a-11a). The court of appeals stated that "[a]lmost all of the District Court's various rulings were judicious and proper" (*id.* at 3a). But the court of appeals faulted the district court for focusing on whether researchers had received promises of confidentiality; the court of appeals stated that "proof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants * * * [cannot] be dispositive of the question whether a given informant qualifies as an 'intelligence source' " (*id.* at 6a). The court of appeals entered an order reversing "the District Court's determination regarding which of the individual reasearchers satisfy the 'need-for-confidentiality' portion of the [court of appeals' definition] of 'intelligence source' " but affirming "[a]ll other aspects of the [district] court's decision" (*id.* at 11a).

On March 5, 1984, this Court granted our petition for a writ of certiorari in No. 83-1075. That case presents the question whether the court of appeals' definition of "intelligence sources" is correct.

2. Cross-petitioners do not suggest that the issue they raise is inextricably bound up with the question presented in No. 83-1075, or that the Court will be unable fairly to resolve the question presented in No. 83-1075 unless it grants the cross-petition. Instead, they cross-petition simply

---

[1]The district court did not discuss the institutions, but when it entered its order it exempted them from disclosure.

because they believe that the courts below erred and that they are entitled to relief—the disclosure of the identities of all the institutions at which MKULTRA research was conducted—that they will not receive if this Court simply affirms the court of appeals' decision.

a. If this Court disagrees with our submission in No. 83-1075 and upholds the court of appeals' approach, the district court, on remand, will apply the court of appeals' definition of "intelligence sources" to some of the individual researchers whose identities it had previously exempted from disclosure.[2] Upon doing so, the district court might determine that the identities of some of those individual researchers should continue to be protected from disclosure. Cross-petitioners have not challenged this aspect of the court of appeals' ruling. They do appear to contend, however, that those individuals' institutional affiliations should be subject to disclosure.[3] This assertion is incorrect.

Neither the district court nor the court of appeals explained in detail its reasons for exempting from disclosure the institutional affiliations of those individuals whose identities are exempt. But as cross-petitioners recognize, the basis of the decision below is nevertheless reasonably clear: identification of the institutions could enable interested parties (such as a hostile foreign intelligence service) to

---

[2]It appears that the court of appeals reversed only the district court's ruling on the researchers who were exempted because they had received promises of confidentiality and affirmed the district court's decision to exempt those individuals who had engaged in other intelligence activities, in addition to MKULTRA, for the CIA.

[3]If the identity of an individual researcher is correctly ordered to be disclosed, it may no longer be appropriate to exempt that individual's institutional affiliation from disclosure. We do not interpret the court of appeals' order necessarily to require that the district court continue to exempt an institution's identity after it is disclosed that an individual at that institution performed MKULTRA research.

identify the researchers.[4] This was a principal reason advanced by the CIA in the district court for protecting the identities of the institutions (see J.A. 115);[5] it was the argument the Agency made to the court of appeals in defending the district court's decision (see Gov't C.A. Br. 34-37); and it was the reasoning that the court of appeals used in *Gardels* v. *CIA*, 689 F.2d 1100 (1982), where it held that the Agency need not confirm or deny the identities of institutions at which it has professional or academic intelligence sources.

This Court should not review the district court's and the court of appeals' concurrent determination that, where an individual's identity remains exempt, his institutional affiliation should also be protected in order not to provide a lead that can be used to identify the individual. As cross-petitioners' own arguments reveal, that determination is essentially fact-bound; cross-petitioners' contention is that the evidence does not support the district court's ruling. See, *e.g.*, Pet. 4 ("[T]here was no evidence to show that identification of institutions would lead to identification of researchers."); *ibid.* ("For * * * reasons [based on the particular facts of this case] * * * it was highly unlikely that the

---

[4]Cross-petitioners leave no doubt that they regard this as the basis of the decision of the courts below. They assert that "there was no evidence to show that identification of institutions would lead to identification of researchers" (Pet. 4; see *id.* at 5-6) and that "it was highly unlikely that the disclosure of the institutions could lead to the revelation of the researchers" (*id.* at 4). Cross-petitioners also characterize the question presented by their petition as involving "the extent to which an agency must prove that identification of a non-confidential entity will lead to disclosure of a confidential source" (*id.* at 5).

We note that while we agree that this was the basis of the decision below, we believe that the institutions at which MKULTRA research was conducted are exempt from disclosure for the additional reason that they are themselves "intelligence sources."

[5]"J.A." refers to the Joint Appendix filed in the court of appeals on January 3, 1983.

disclosure of the institutions could lead to the revelation of the researchers."); *id.* at 5-6 ("[T]here was no evidence offered to show that identification of these institutions * * * would lead to the identification of exempt researchers."). Cross-petitioners ask the Court to provide "guidance" on this issue (*id.* at 5), but it is unclear what kind of guidance the Court can provide; rather, cross-petitioners are asking the Court to review the record and decide if it supports the decision of the courts below.

A CIA affidavit provides a basis for the district court's ruling that disclosure of the institutions would risk revealing the identities of the individual intelligence sources they employed. It was appropriate for the court to defer to the Agency's judgment on this question. "This is, necessarily a region for forecasts in which informed judgment as to potential future harm should be respected." *Gardels*, 689 F.2d at 1106. There is, accordingly, no reason for this Court to reassess the lower courts' resolution of this issue.

b. We note that cross-petitioners' contentions have no logical relationship to the question presented in No. 83-1075. That question concerns the definition of intelligence sources. Cross-petitioners have no quarrel with the court of appeals' definition of intelligence sources; they simply contend that the courts below erred in concluding that when an individual whom they considered to be an intelligence source was affiliated with an institution, it was necessary to exempt the institution from disclosure in order to protect the individual source. It is certainly appropriate for this Court to determine the correct definition of "intelligence sources" exempt from disclosure under the FOIA without considering the more fact-bound question of—to use cross-petitioners' words—"the extent to which an agency must prove that identification of a[n] * * * entity" that may not

itself be an intelligence source "will lead to disclosure of a confidential source" (Pet. 5).[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1984

---

[6]See page 5 note 4, *supra*.

No. 83-1075 and 83-1249

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CENTRAL INTELLIGENCE AGENCY,
and WILLIAM J. CASEY,
Petitioners-Respondents,

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
Respondents-Petitioners.

**ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF FOR RESPONDENTS IN No. 83-1075 AND FOR PETITIONERS IN No. 83-1249

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON
DAVID C. VLADECK

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents-Petitioners

THE CASILLAS PRESS, INC. 1717 K Street N.W. • Washington, D.C. • 223-1220

QUESTIONS PRESENTED

I. (in No. 83-1075)

Are scientific researchers, engaged in research in the United States more than twenty years ago, "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3) and therefore exempt from disclosure under Exemption Three of the Freedom of Information Act?

II. (in No. 83-1249)

Did the court of appeals err by affirming, without explanation, the district court's decision to permit the Central Intelligence Agency to withhold the names of institutions at which MKULTRA research was conducted, even though the institutions themselves are not "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3), and even though the CIA failed to present any evidence to show that disclosure of the institutions would lead to identification of researchers?

TABLE OF CONTENTS

Table of Contents, cont'd: **Page**

TABLE OF AUTHORITIES:

Cases **Page**

Statutes

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 83-1075 and 83-1249

CENTRAL INTELLIGENCE AGENCY,
and WILLIAM J. CASEY,
Petitioners-Respondents,

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
Respondents-Petitioners.

ON WRITS OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN No. 83-1075 AND FOR PETITIONERS IN No. 83-1249

INTRODUCTION

This action under the Freedom of Information Act, 5 U.S.C. § 552, seeks access to records of the Central Intelligence Agency ("CIA") which identify the researchers and institutions involved in the MKULTRA project — the CIA's research program, conducted in the late 1950s and early 1960s, into behavioral modification techniques and mind-altering drugs. There are three points which merit emphasis at

the outset because, taken together, they provide the cornerstone of despondents' case before this Court.[1]

First, this is a case arising under the Freedom of Information Act ("FOIA") — not the National Security Act. This difference is vital because the CIA asks this Court to construe the term "intelligence source" in 50 U.S.C. § 403(d)(3) in isolation. forgetting that its only relevance is that it is incorporated into the FOIA by operation of Exemption 3 of the FOIA. 5 U.S.C. § 552(b)(3). Thus, although we agree with the CIA that the meaning of the term "intelligence source" is the principal issue before the Court, that term must be construed in a manner consistent with the dictates of Exemption 3 and the other provisions of the FOIA.

Second, the CIA studiously avoids focusing on the facts of *this* case. Aside from a perfunctory statement of the case, virtually all of the illustrations used by the CIA in its brief have nothing to do with the information that respondents seek. On the contrary, the facts of this case are highly unusual, inasmuch as the MKULTRA program involved nothing even remotely resembling the sort of intelligence activities to which the CIA alludes throughout its brief. Rather, MKULTRA entailed entirely academic research conducted primarily by college professors in the United States, almost half of whom were unaware that they were working for the CIA. Indeed, it is precisely because the underlying activities were so far removed from the basic mission of the CIA that the Agency has steadfastly refused to defend this case on the basis of the FOIA's national security exemption, 5 U.S.C § 552(b)(1).

Third, throughout its brief the CIA persists in suggesting that the court of appeals' definition of "intelligence source" stands as a hard and fast, bright-line test of what constitutes an intelligence source, to be applied as if it were a statutory

[1]In this brief, Mr. Sims and Dr. Wolfe, respondents in No. 83-1075, and petitioners in No. 83-1249, will be referred to as "respondents." The petitioners in No. 83-1075, which are also the respondents in No. 83-1245, will be labeled "petitioners", "CIA" or "the Agency."

definition. That is not the case. As the court of appeals emphasized in *Sims I,* it was in response to the CIA's urging that the court sought to formulate a general test to guide the courts. Thus, in holding that the term "intelligence source" had to be construed in a manner that would "focus on the practical necessity of secrecy," the court laid down guidelines which would have to be applied with an eye toward the CIA's "functional" needs, not an ironclad, inflexible definition, as the CIA contends.

STATEMENT

A. The MKULTRA Project

Between 1952 and 1966, the CIA financed a program of experimental, laboratory and library research devoted primarily to behavior modification techniques and mind-altering drugs. The projects, all of which were conducted in the United States, were known collectively as MKULTRA. The research was essentially academic in nature, ranging from drug experiments on individuals to laboratory research on deterioration of petroleum products, from the synthesis of mind-altering drugs to the preparation by a magician of a manual on sleight-of-hand techniques.

Many of the scientists were funded through a front organization, the Society for Investigation of Human Ecology. As a result, many of the projects' researchers — not to mention the major universities and other institutions at which they were employed, which were often not even advised that the contracts had been awarded — were unaware of the CIA's involvement.

Revelation of the existence of the MKULTRA program in 1975 provoked considerable controversy about government abuse of scientific research, about CIA use of campus facilities, and about scientists' abuse of human experimental subjects. Although the general areas covered by the project have been discussed at Congressional hearings, in television

news specials, and in various publications, most of the details are as yet unknown. The reason for this is that in 1973, departing CIA Director Richard Helms arranged for the destruction of all known files pertaining to MKULTRA, in order to prevent it from being "misunderstood." Marks, *The Search for the Manchurian Candidate* 205 (1979). According to the special Senate Committee which was established to inquire into this and other questionable CIA activities:

> The destruction of the MKULTRA documents made it impossible for the Select Committee to determine the full range and extent of the largest CIA research program involving chemical and biological agents [and] prevented the CIA from locating and providing medical assistance to the individuals who were subjects in the program.
>
> Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Final Report: Foreign and Military Intelligence,* S. Rep. No. 755, 94th Cong., 2d Sess. 404 (1976). *See also id.* at n. 75.

Although the CIA followed Helms' instructions, its archivists failed to find certain MKULTRA records that had been misfiled. For the most part, the surviving documents are research contracts, vouchers, bills, and similar materials concerning the initiation and financing of the projects. Apart from a few progress reports used to justify requests for more money, and occasional substantive references in the contracts that permit educated guesses about the basic objectives of certain subprojects, the documents are singularly uninformative about the matters of greatest public interest — what did the researchers do, what were their findings, what were the side effects of the work and who was victimized. Indeed, the CIA, following what it described as a "careful review" of the documents, found that they contained no information which required "continued protection," and accordingly declassified them in 1977. Pet. App. 90a. Because the leading CIA figures in the program have either refused to discuss the details or

claimed poor memory, the only remaining avenue to investigate MKULTRA is to identify the researchers, talk to them, and then to undertake further independent analysis to determine what they did.

B. **Proceedings Below**

1. *Sims I*

On August 22, 1977, respondents John Cary Sims, a lawyer, and Sidney M. Wolfe, M.D. the director of the Public Citizen Health Research Group, made a request to the CIA under the FOIA to release records identifying both the principal researchers ("PRs") for all MKULTRA subprojects and the institutions at which each PR conducted his or her work. Although the CIA initially refused to honor the request, citing Exemptions 3 and 6, respondents acceded to the CIA's suggestion that further action be deferred until it had had an opportunity to contact the institutions (but not the PRs) to learn whether they would object to their identification.

On June 13, 1978, the CIA sent respondents a final response refusing to provide the names of any PRs. It did include alphabetical lists of the institutions at which the researchers conducted their work, including subproject numbers for each institution.[2] From those lists, the CIA deleted the names of approximately one-third of the institutions, which either did not respond to the CIA's two letters or asked for anonymity. In no instance did the CIA even consider that, by identifying an institution, it might lead to identification of the researcher who worked there; it simply acceded to the wishes of each institution in deciding whether to identify that institution.

Respondents filed this FOIA action on November 30, 1978. The CIA initially asserted two grounds for withholding the identities of the PRs and their institutions. First, it claimed that the identities were exempt pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), which protects matters "specifically exempted from disclosure by statute," if the other statute either leaves the agency no discretion on

---

[2] The lists are reproduced as an Addendum to this brief.

withholding, or sharply confines the agency's discretion. The CIA contended that because the MKULTRA work was of assistance to the CIA's intelligence-gathering function, the PRs and the institutions were exempt from disclosure as "intelligence sources" within the meaning of 50 U.S.C. § 403(d)(3). Second, the Agency asserted that identification of the PRs would constitute "a clearly unwarranted invasion of [their] personal privacy," and thus nondisclosure of the researchers' identities was authorized by Exemption 6 of the FOIA. 5 U.S.C. § 552(b)(6).[3]

Although its briefs and affidavits were replete with references to national security, and although the district court, concerned about the validity of the Agency's other defenses, repeatedly urged the CIA to consider invoking the national security exemption, 5 U.S.C. § 552(b)(l), the Agency declined to do so. It also rejected the district court's repeated suggestions that it correspond directly with the PRs, as it had with the institutions, to learn whether they objected to disclosure and whether they had expected that their identities would be kept secret. The CIA claimed that such correspondence, even if not revealed to respondents, would itself be an invasion of the privacy of those PRs who were unaware of their CIA connection.

Finally, in a further effort to afford the CIA protection from the reach of the FOIA, the district court hypothesized that the CIA might have implicitly or explicitly promised confidentiality to the PRs, and invited the parties to brief the question of whether the CIA might be contractually bound not to release their identities, and whether the FOIA, which was passed after these contracts were made, could constitutionally abrogate the Agency's secrecy obligations. The CIA, however, declined to rely on that theory, inasmuch as it would also prevent the Agency from releasing the identities if it chose to do so. *See* Pet. App. 7la, 74a-75a.

[3] Both the district court and the court of appeals rejected the Agency's privacy claim, Pet App. 53a-58a, 80a-82a, and the issue was not presented in the petition for a writ of certiorari.

On cross-motions for summary judgment, the district court rejected the CIA's claims in two opinions. Pet. App. 66a-70a and 73a-82a. The court reasoned that the CIA had failed to establish that these researchers or institutions were "intelligence sources" within the meaning of § 403(d)(3), and that the CIA's proposed definition of the statutory term — any "contributor to the intelligence process" — was far too broad to be acceptable. Pet. App. 78a. In rejecting the CIA's approach, the court ruled that persons who conducted academic research for purposes "collateral to the business of intelligence" were not "intelligence sources" within the meaning of the term. Pet. App. 79a.

On appeal, the CIA offered a new definition of "intelligence source", *i.e.,* any individual or entity that provides the CIA with "substantive information having a rational relation to the nation's external national security." Pet. App. 46a. The court of appeals, however, rejected this proposal as too broad. Rather, it said, in light of the FOIA's objective of ensuring that the matters exempted from disclosure be defined by legislative judgments rather than unreviewable executive discretion, the "intelligence sources" exemption should be construed in accordance with the purpose of § 403(d)(3). Taking up the CIA's request for a definition of the statutory phrase, the court of appeals focused on the "practical need" for secrecy in order to protect the sources and produced the following working definition of "intelligence sources" designed, in large part, to deal with the case before it:

> an intelligence source is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.
>
> Pet. App. 50a.

The case was thus remanded to the district court for application of the definition to the identities at issue. Judge

Markey agreed that the CIA's proposed definition "sucks into which secrecy's maw too many sources of too many kinds of information," and wholeheartedly endorsed the majority's construction of § 403(d)(3). Pet. App. 6la. He dissented only on the necessity of a remand, because in his view the CIA had steadfastly refused to seek or present the kind of evidence which would be necessary on remand, Pet. App. 62a, and because it was plain to him that these PRs and institutions were not "intelligence sources" and hence their names should be released immediately. Pet. App. 63a-64a.

2. *Sims II*

On remand, the CIA extensively searched its files for documentary evidence bearing on any explicit or implicit promises of confidentiality made to any PRs. However, it still declined to contact either the PRs or those CIA employees who had been directly involved in the MKULTRA program to support its defense. Instead, it relied principally on two affidavits from M. Corley Wonus, a current CIA official who had no personal knowledge of any aspect of MKULTRA. App. 15-28. The Agency's submissions presented general arguments about the importance of protecting the confidentiality of intelligence sources, a matter which has never been disputed, and made claims that the evidence showed that both the CIA and the PRs desired confidentiality. The Agency also argued in its briefs that it was unnecessary to show that a particular researcher wanted anonymity to qualify as an intelligence source, so long as the CIA could show that it had tried to keep the researchers' activities secret for its own purposes — *i.e.,* to prevent other nations from learning the research topics on which the CIA was working. In this regard, the CIA did not address, much less explain, the apparent anomaly of invoking Exemption 3 to protect its secrecy interests instead of asserting Exemption 1, which is specifically tailored to protecting national security information.

Because the CIA was unwilling or unable to produce evidence showing a need for confidentiality for most of the PRs, the district court ruled that almost none of the

MKULTRA researchers were intelligence sources. First, it reasoned that unless the CIA had in fact provided the PRs with explicit or implicit guarantees of confidentiality, it could not be said that such a guarantee was needed in order to secure information from the researcher. Although the record revealed ample evidence of a desire on the part of the *CIA* to keep the program secret, it revealed "very little evidence that any of the researchers themselves desired confidentiality." Pet. App. 23a. Indeed, the evidence revealed numerous cases before, during and after MKULTRA in which the CIA had had to take steps to stop PRs from revealing the CIA's involvement in their research, but not the opposite. Pet. App. 26a; App. 57, 60. Moreover, it was obvious from the nature of many of the subprojects that they could readily be explored without a guarantee of confidentiality.[4]

However, for six PRs there was evidence demonstrating that the PR had told the CIA that he was concerned about confidentiality, or the evidence otherwise suggested an implicit guarantee of confidentiality. The district court concluded, and respondents did not disagree, that the CIA had proven that these six PRs were intelligence sources; the court therefore allowed their names to be withheld. Pet. App. 26a. However, as respondents stressed, and as the district court observed: "The absence of such evidence with respect to almost all other researchers stands in stark contrast." Pet. App. 26a.

Despite its ruling, the district court did not order the release of the identities of the remaining PRs or of their institutions. Instead, it allowed the CIA to submit voluminous additional *in camera* affidavits and supporting documents, and it con-

[4] The district court cited several examples. Pet. App. 25a-26a. Others included a magician who was paid to write a manual on sleight-of-hand techniques; research on aerosol delivery systems; a study of the relationships between molecular constitution and biologic response; a study of sleep and insomnia; investigation of the absorption of alcohol into the blood; reviews of published literature about handwriting analysis and similar subjects; and a study of ways to obtain information from soil. *See generally* Analysis of MKULTRA Principal Researcher Files, submitted with Plaintiffs' Motion for Summary Judgment, June 10, 1981.

ducted four *ex parte, in camera* hearings attended only by CIA officials and their counsel. Based on this new evidence, the district court found that an additional 41 PRs had been engaged in other work for the CIA which made them intelligence sources, and allowed the CIA to withhold their identities because their connection with MKULTRA might lead to the exposure of their other CIA work. Pet. App. 28a-31a. The court also accepted the argument made in the CIA's briefs, unsupported by any affidavits or other evidence and indeed undermined by the Agency's disclosure of two-thirds of the institutions, that, although the institutions were not themselves intelligence sources, identification of an institution could lead to disclosure of a PR. Accordingly, the court allowed the CIA to withhold the identity of any institution whose researcher's identity was exempt from disclosure. Pet. App. 27a.

Both sides appealed. The court of appeals did not discuss the issue of the institutions, thus implicitly affirming the district court in that regard. With respect to the PRs, however, it reversed the district court in every respect and remanded the case to permit application of the *Sims I* definition, as refined in *Sims II*. Pet. App. 9a. Specifically, the court ruled that the key issue in deciding whether a PR was an intelligence source was the "kind" of information provided. Pet. App. 4a-5a. The fact that confidentiality was desired by a researcher would be probative of the need for secrecy, but could not be conclusive, both because a particular researcher might be either atypically sensitive or atypically insensitive to public disclosure and because the CIA might collude with a researcher to manufacture requests for, or promises of, confidentiality. Pet. App. 6a-7a. Accordingly, the district court was directed to reconsider the status of all PRs.

Judge Bork dissented in part. He disagreed with the majority's readiness to discount an express promise of confidentiality, and he declined to join in a phrase in the majority opinion which attributed the CIA's resistance to disclosure to a fear of public outcry about MKULTRA. Finally, without discussing the availability of Exemption 1, he expressed "some doubt"

about the *Sims I* definition of intelligence source because he feared that the CIA might not be able to protect the secrecy of its interest in certain topics.

Both sides petitioned for rehearing. The CIA sought reconsideration of the ruling in *Sims I* as well, suggesting rehearing en banc. Respondents sought only clarification and an express ruling on the status of the institutions. The court denied both petitions.

SUMMARY OF ARGUMENT

1. The principal issue in this case is whether scientists who conducted research in the United States for the CIA more than twenty years ago are "intelligence sources" whose names may be withheld under Exemption 3 of the FOIA and 50 U.S.C. § 403(d)(3). The Agency makes no claim that release of that information would damage the national security and hence could be properly classified. Instead, petitioners urge this Court to adopt a virtually limitless and judicially unreviewable definition of the term intelligence source, in direct contravention of (a) the basic disclosure goal of the FOIA, (b) the narrowing purpose of the 1976 amendment to Exemption 3, (c) Congress' rejection of virtually the same plea when it overturned this Court's decision in *EPA v. Mink*, 410 U.S. 73 (1973), and (d) the principal method by which Congress sought to control improper agency withholdings — *de novo* judicial review.

The CIA argues that, as used in 50 U.S.C. § 403(d)(3), an "intelligence source" is any person who provides the CIA with "intelligence information"; this term, in turn, is defined by the Agency as any information which the CIA reasonably believes it needs, Br. at 28, a formulation even broader than that which it proposed in the court of appeals. Respondents agree that an intelligence source is one who provides the CIA with a certain kind of information, namely intelligence, but that does not mean that any information reasonably desired by it constitutes "intelligence." The courts below properly rejected the CIA's concept of an intelligence source as overly broad, and instead formulated a definition which correctly

distinguished between those who warranted protection and those who did not.

The major flaw in the CIA's argument is that it views § 403(d)(3) in isolation, without reference to the policies of the FOIA, to the broader statutory scheme of which § 403(d)(3) is a part, or to the unique facts of this case. Thus, § 403(d)(3) is relevant only insofar as it allows the CIA to withhold records under the FOIA, which requires disclosure of all matters not explicitly allowed to be kept secret. Here withholding is pursuant to Exemption 3, which was originally construed to include statutes affording agencies open-ended discretion to withhold records. *Federal Aviation Admin. v. Robertson,* 422 U.S. 255 (1975). However, Congress overruled this construction by amending the exemption to include only statutes in which Congress itself has made the basic decisions about which matters should be disclosed and either eliminated or narrowly confined the Agency's discretion to decide whether particular records should be withheld. Accordingly, in order to apply § 403(d)(3) to authorize withholding under the FOIA it is necessary to construe it in a manner which would make it an Exemption 3 statute. Yet to give § 403(d)(3) the breadth urged by the CIA would preclude it from being an Exemption 3 statute, a result which the CIA plainly does not desire.

The Agency also severs § 403(d)(3) from its own legislative history. Although Congress recognized that intelligence sources would be a diverse lot, the CIA's intelligence mission was intended to focus principally on gathering information about foreign countries which could not be obtained if the targets of the inquiry knew of the CIA's efforts. Congress was also aware that the sources of this "intelligence" would face "deadly peril" if their roles were revealed. To protect the identities of such covert sources, Congress mandated in § 403(d)(3) that the CIA protect "intelligence sources and methods from unauthorized disclosure." Scientific researchers like those involved in this case simply do not present the problem that Congress sought to avoid.

The court of appeals, asked by the CIA to formulate a definition of intelligence sources, defined the term to include providers of information, needed for the intelligence function, which the CIA "could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it." That definition constitutes a workable formula for protecting those whose safety might be imperiled by disclosure, while at the same time enabling the courts to continue to conduct a *de novo* review of agency withholding claims, as the FOIA requires. The CIA recognizes the need to draw some line, but argues that the Agency alone should perform that function. That approach would transform § 403(d)(3) into a standardless non-disclosure statute of the sort which Congress intended to exclude from Exemption 3 by the post-*Robertson* amendment.

In order to persuade the Court to reject the court of appeals' formulation as unduly narrow, the CIA asserts that it would result in the devastation of the intelligence-gathering function. The CIA's analysis is flawed because it both misconstrues the court of appeals' formulation and ignores the many other defenses the CIA can mount against disclosure, principally Exemption 1 of the FOIA which provides blanket protection for information whose disclosure would harm national security.

The CIA's final objection is that the availability of judicial review itself threatens its mission because it creates a perception on the part of potential intelligence sources that their identities cannot be fully protected. But this perception cannot be avoided without exempting the CIA from the core requirement of the FOIA, *de novo* judicial review of agency withholding. Indeed, even the withholding of classified national security information, such as troop movements and deployment of nuclear weapons, is subject to judicial review as a result of the 1974 amendment to Exemption 1 which overruled *Environmental Protection Agency v. Mink,* 410 U.S. 73 (1974). Moreover, since Congress has repeatedly refused CIA requests for exemption from judicial review under the FOIA,

this Court may not grant the CIA that which Congress has refused it.

2. The cross-petition for certiorari challenges the CIA's refusal to identify the institutions at which the researchers who are found to be intelligence sources performed their work, unless the institutions expressly consented. The courts below allowed withholding on the theory that, although the institutions are not themselves sources, their disclosure could "lead to" identification of researchers who are. But the CIA failed to submit any evidence to support this "lead to" argument, although the FOIA squarely places the burden on the agency to justify withholding. Moreover, the Agency had previously identified some two-thirds of the institutions and the subprojects performed there without any concern that such disclosure might lead to identification of the researchers; yet it offered no explanation for the glaring contradiction.

ARGUMENT

I. DOMESTIC SCIENTIFIC RESEARCHERS WHO WERE PAID BY THE CIA TO DO LABORATORY AND LIBRARY RESEARCH MORE THAN TWENTY YEARS AGO ARE NOT "INTELLIGENCE SOURCES" WHOSE NAMES ARE EXEMPT FROM DISCLOSURE UNDER 50 U.S.C. § 403(d)(3) AND EXEMPTION 3 OF THE FOIA.

A. The FOIA Requires That Statutory Exemptions Such as Section 403(d)(3) Be Construed Narrowly.

Any attempt to comprehend the scope of an exemption from mandatory disclosure under the FOIA, such as § 403(d)(3), must begin with an understanding of the statutory scheme of disclosure embodied in the FOIA itself. The FOIA was enacted because Congress was dissatisfied with the failure of federal agencies to disclose information under the vague standards of section 3 of the Administrative Procedure Act, which allowed agencies to withhold data "requiring

secrecy in the public interest." *Chrysler Corp. v. Brown,* 441 U.S. 281, 293 (1979).

Congress responded with the FOIA, which established a broad mandate for disclosure, subject to nine Congressional exemptions. The Act requires that all matters be made public "unless *explicitly* allowed to be kept secret by one of the exceptions . . . ." S. Rep. No. 813, 89th Cong., 1st Sess. 15 (1965) (emphasis added). Courts are directed to review claims of exemption *de novo,* and "the burden is on the agency to sustain its actions." 5 U.S.C. § 552(a)(4)(B). Moreover, the exemptions "must be narrowly construed." *Department of Air Force v. Rose,* 425 U.S. 352, 361 (1976). Consequently, this Court has "consistently recognized that the basic objective of the Act is disclosure," *Chrysler Corp. v. Brown, supra,* 441 U.S. at 290. *See also Department of Air Force v. Rose, supra,* 425 U.S. at 361 ("the basic policy [is] that disclosure, not secrecy, is the dominant objective of the Act").[5]

This case involves Exemption 3, which allows withholding on the basis of other, specific nondisclosure statutes. As originally enacted, Exemption 3 included any matters which were "specifically exempted from disclosure by statute." This provision was broadly construed in *Federal Aviation Admin. v. Robertson,* 422 U.S. 255 (1975), where this Court ruled that Exemption 3 included a statute with the kind of open-ended agency discretion that the CIA argues is embodied in § 403(d)(3). *Compare id.* at 263-267 *with* CIA Br. at 22-24.

Congress promptly responded to *Robertson* by amending the FOIA to narrow Exemption 3 considerably. Section 5(b), Government in the Sunshine Act, Pub. L. 94-409 (1976). Rather than allowing an agency to withhold records pursuant to *any* Congressional enactment permitting secrecy, the new exemption includes only a statute which

---

[5] The CIA's brief makes repeated deprecating references to "what the court of appeals considered to be the pro-disclosure 'spirit' of the FOIA." Br. at 12, 22, 23. Contrary to the implication of these references, the pro-disclosure philosophy of the statute appears on its face, in its legislative history, and in the decisions of this Court.

> (A) requires that the matters be withheld from the public in such a way as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Congress believed that the construction of Exemption 3 in *Robertson* created a "gap" in the FOIA since it gave the power to the agencies, rather than to Congress, to make the policy decision about whether a particular record should be disclosed. H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 23 (1976). Thus, the express purpose of the 1976 amendment was to overrule the open-ended secrecy rule of *Robertson*. H. R. Conf. Rep. No. 94-1441, 94th Cong., 2d Sess. 25 (1976). The new Exemption 3 removed agency discretion to keep records secret. Instead, it allowed withholding only pursuant to those statutes in which the legislative branch, rather than the executive branch, had not only made the basic policy decision concerning the dangers of releasing certain data, but also provided a formula ("particular criteria" or "particular types" of matters) pursuant to which both the agency and reviewing courts could decide whether disclosure in any instance would pose the hazard that Congress foresaw. *Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 614-616 (9th Cir. 1978); *American Jewish Congress v. Kreps*, 574 F.2d 624, 628-629 (D.C. Cir. 1978).

The committee reports on the 1976 amendment listed several statutes that would be included under it. However, contrary to the claim made in the CIA's brief, at 15, nowhere did Congress specify that the new Exemption 3 incorporated 50 U.S.C. § 403(d)(3) as a withholding statute. The 1974 committee reports cited at page 15 of the CIA's brief are singularly unhelpful — they did indeed say that § 403(d)(3) was included in Exemption 3, but referred only to the old Exemption 3 language which was construed in *Robertson*. The 1976 report cited by the Agency has greater bearing, but is actually contrary to the CIA's position because it proposed adding language, ultimately not adopted, which it described as

necessary to "clarify" that § 403(d)(3) would be included within the exemption.[6]

The only basis for treating § 403(d)(3) as an Exemption 3 statute would be a determination that, as properly construed, that section provides an explicit formula which meets the 1976 standard because it eliminates entirely (subpart A), or narrowly confines (subpart B), the Agency's discretion to decide whether records should be withheld. The statute plainly does not fall within subpart (A), inasmuch as it does not require witholding in such a way as to eliminate all discretion. Nor does it establish "particular criteria for withholding" under the first clause of subpart (B). Thus, § 403(d)(3) can only be included if it refers to "particular types" of information "to be withheld" — the second clause of subpart B.

In these circumstances, it was scarcely "fundamentally misconceived", as the CIA contends, Br. at 22, for the court of appeals to construe § 403(d)(3) in light of the dictates of the 1976 amendment to Exemption 3. Absent such a construction, the provision would be too expansive and too discretionary to pass muster under Exemption 3, and thus the CIA would not be able to rely on § 403(d)(3) to withhold the names of any intelligence sources. Instead, it would be required in each case to establish that disclosure of the name would damage the national security and would therefore be exempt pursuant to Exemption 1.

The CIA nevertheless argues for a construction of the statute which ignores the intent of the post-*Robertson* amendment and looks only to the legislative history of § 403(d)(3) which, as shown in the next section of this brief, is not very il-

---

[6] To understand the genesis of the language ultimately substituted for Exemption 3, *compare* the House Government Operations Committee Report, H. R. Rep. No. 94-880, 94th Cong., 2d Sess., Part I at 9 (1976) (includes only statutes that require withholding) with the House Judiciary Committee Report cited by the CIA, *id.*, Part II at 15 (includes statutes that "require or permit" withholding). The enacted statute excludes the "or permit" language and substitutes for it subpart (B) requiring particular criteria or particular types of information. *See Lee Pharmaceuticals v. Kreps*, 577 F.2d 610, 615-616 nn. 4 and 8 (9th Cir. 1978).

luminating. But it is fundamental law that the courts may properly take into account a later development in "an evolving pattern of regulation" — here, the legislative scheme for public access to government information — in deciding the meaning of unclear language in part of the scheme previously enacted. *NLRB v. Teamsters Local 639 (Curtis Bros.)*, 362 U.S. 274, 291-292 (1960), *quoted in NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *Hunter v. Erickson*, 393 U.S. 385, 388 (1968). Thus, the basic proposition that FOIA exemptions "must be narrowly construed," *Department of Air Force v. Rose, supra,* fully applies to statutes which become exemptions by way of Exemption 3. More specifically, section 403(d)(3) should be construed in a manner consonant with the congressional formula on which the 1976 amendment to Exemption 3 was premised, and in a manner which would "fulfill Congress' intent to close the loophole created by *Robertson* . . . ." *Founding Church of Scientology v. NSA*, 610 F.2d 824, 829 (D.C. Cir. 1979).

B. *Section 403(d)(3) Was Not Intended to Bar Disclosure of Researchers Like the MKULTRA Scientists.*

The legislative history of § 403(d)(3) fails to buttress, and even undercuts, the CIA's expansive construction of the term "intelligence sources." The framers of the National Security Act of 1947, 50 U.S.C. § 401 *et seq.*, were primarily concerned with the coordination and division of responsibility among the various departments after the national security and national defense functions were reorganized in the aftermath of World War II. 50 U.S.C. § 401. During the War, the Office of Strategic Services, the CIA's predecessor agency, had been barred from operating in the Western Hemisphere and was denied access to intelligence obtained by other bodies.

Titles I and II of the Act, 61 Stat. 496-507, create the various military and security agencies and allocate the various defense and security functions among them. Section 102, 50 U.S.C. § 403, creating the CIA, provided in subsection (d)(3) that although the Agency would correlate, evaluate, and disseminate intelligence, other agencies would

continue to share in that responsibility. It then added that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." The section does not, on its face, require the withholding of any information but simply assigns to the CIA (rather than to each individual agency) the task of protecting "intelligence sources" for all agencies from unauthorized disclosure. The fact that § 403(d)(3) was written as an organizational rather than information-withholding statute perhaps explains why its legislative history contains no hint as to what the term was meant to cover.

Recognizing the absence of legislative history on the meaning of intelligence sources, the CIA instead relies on remarks by members of Congress and intelligence officials about the intelligence which was required to carry on the CIA's mission and the means by which it would be obtained. Because the scope of the intelligence contemplated by Congress was highly diverse, the CIA argues, the term "intelligence sources" should be equally diverse — broad enough to cover even such MKULTRA researchers as the scientists who conducted cancer research and laboratory studies concerning the deterioration of petroleum products or the educator who studied the usefulness of mechanization in foreign language instruction.

But contrary to the CIA's argument, the very remarks upon which it relies, Br. at 18-19, suggest that Congress had a very different sort of "intelligence source" in mind when it enacted § 403(d)(3):

- Information would be gathered about the armed forces, industries, race, religion and "other related aspects" of a possible enemy (Admiral Nimitz).
- Americans who traveled around the world would report what they see and hear (Allen Dulles).
- "[A]ll possible data pertaining to the foreign governments or the national defense and security" would be used (General Vandenberg).
- The agency would receive "information coming

> from all over the world through all kinds of channels." (Rep. Wadsworth).

These are the "Intelligence sources" Congress had in mind. Plainly, their ability to provide reliable information to the CIA depended on foreign ignorance that they were doing so. In order to recruit them, it was necessary to guarantee that their CIA connection would be kept confidential. They are the "sources" of which Messrs. Dulles and Vandenberg spoke, CIA Br. at 20, and of which this Court wrote in *Snepp v. United States,* 444 U.S. 507, 512 (1980), who would "close up like a clam" if they could not be guaranteed confidentiality and who would face "deadly peril" if their identities were revealed. They are, however, a far cry from the alleged "intelligence sources" involved in this case. The scientific researchers — not to speak of the magician who was engaged to write a manual on sleight-of-hand techniques — did not depend on confidentiality to gain access to information; few of them sought or received pledges of confidentiality, and they scarcely faced peril from identification — or face it today if they are even alive thirty years later.

Indeed, the legislative history suggests that Congress believed that the CIA's intelligence sources would not extend to scientific researchers working within the United States. Thus, Representative Holifield reassured his colleagues as follows:

> I want to impress upon the minds of the Members that the work of the Central Intelligence Agency, as far as the collection of evidence is concerned, is strictly in the field of *secret foreign intelligence — what is known as clandestine intelligence.*
>
> 93 *Cong. Rec.* 9430 (1947)(emphasis added).

Neither Representative Holifield, nor the rest of the Congress that heard his remarks and passed the National Security Act, would have expected the CIA to be paying domestic scientific researchers to study extrasensory perception, the placebo effect, or blood groupings as a means of identification; nor did they contemplate that such researchers would be sources of "intelligence" within the meaning of the Act.

Accordingly, there is no basis in the legislative history of § 403(d)(3) for believing that Congress intended to include scientific researchers of the sort used for MKULTRA as intelligence sources.

C. *The Court of Appeals' Formulation Provides a Sound Basis for Distinguishing Intelligence Sources From Other Persons Upon Whom the CIA Relies.*

The courts below recognized that the sort of persons that Congress had in mind, and whom the CIA's brief consistently invokes when warning of the dangers of the court of appeals' formulation, are unquestionably intelligence sources protected from unauthorized disclosure. Undercover agents; business, professional and vacation travelers who are debriefed by the CIA on their return from abroad; journalists who talk to the CIA about their contacts — all are obviously intelligence sources as Congress used that term in § 403(d)(3). Yet Congress used the term "intelligence" source, not "information" source, and accordingly the issue before the Court is, how to distinguish between these obvious examples of the "intelligence" sources that Congress had in mind, and others who are sources of information, but not "intelligence sources."

The court of appeals' formulation provides a sound basis for making this distinction:

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

The rule is extrapolated from the characteristics of the traditional sort of intelligence source, whose disclosure was the hazard that Congress sought to prevent. These sources could not obtain information useful to the CIA unless their contacts were kept ignorant of the source's CIA connection. And the CIA would obviously be unable to obtain reliable information

from them without promising that their relationship with the CIA would remain confidential. The court of appeals thus established a formula distinguishing among sources of information who were obviously not intelligence sources and those who were, by taking account of the implicit Congressional objective, that is, the practical need for secrecy to protect the sources of intelligence, which Congress had before it when it enacted the National Security Act.

Although in some parts of its brief the CIA appears to argue that *any* limitation on the scope of the term "intelligence source" would threaten its ability to perform its intelligence mission, an argument discussed *infra* at 33-36, elsewhere it acknowledges that the statutory term has some outer boundaries. The CIA now recognizes the need to distinguish between those who are "intelligence sources" exempt from disclosure and those who are not, but its solution is legally unsound.

Thus, it now concedes (Br. at 36), repudiating its contrary position in the court of appeals, Pet. App. 46a, that § 403(d)(3) would not allow it to withhold the fact that it has obtained information from the *New York Times* and *Pravda*. According to the CIA's new position, the *Times* and *Pravda* are still admitted to be within the literal terms of its proposed definition of "intelligence source," but the CIA should be trusted to exercise its discretion not to invoke § 403(d)(3) because revelation of its use of those publications is "innocuous." Br. at 36.

But the CIA's explanation of what makes disclosure innocuous — that the Agency's consultation is commonly assumed to occur — contains a missing premise which severely undermines the Agency's attack on the decisions below. The CIA's confirmation of the public assumption about its use of these journals is innocuous only because public knowledge of this fact does not interfere with the benefit which the Agency derives from the journals. In other words, because confidentiality of the CIA's connection with the journals is not needed for the intelligence process,

disclosure of that connection is innocuous and need not be prevented. The same analysis would apply to other sources which would not lose their usefulness even if disclosed.

But this approach undercuts the CIA's position in two very important ways. First, because it implies that § 403(d)(3) permits the CIA to decide when a particular person is an "intelligence source," rather than defining with particularity the matters to be withheld, § 403(d)(3) becomes the sort of open-ended discretionary withholding statute which is now excluded from the ambit of Exemption 3(B).

This discretionary approach to disclosure would sweep within § 403(d)(3) many other publications and other sources in addition to the *New York Times* and *Pravda*. For example, the Agency receives various reports from all other agencies which may relate to national defense or security — studies of weather or tide patterns from the National Oceanographic and Atmospheric Administration, estimates of petroleum production or demand from the Department of Energy, economic estimates from the Commerce Department or the Congress' Joint Economic Committee. The CIA also makes frequent use of public libraries, which it argued in the court of appeals were also intelligence sources. Reply Br. in *Sims I*, at 6. Indeed, the CIA's briefs in this Court acknowledge that roughly 80 percent of its raw data is derived from "the great open sources of information." Br. at 38. Presumably, all of these "open sources" are literally intelligence sources under the CIA's construction of the statute, and thus withholdable from public disclosure without any independent national security justification, subject only to the Director's standardless discretion to decide when disclosure would be "innocuous" and therefore permissible.

The second way in which CIA's proposed treatment of "innocuous" sources undercuts its argument is that its analysis is predicated on the recognition that Congress did not intend the CIA to withhold the name of every person who provided any kind of information which was useful to the Agency's mission. But unlike the court of appeals' formulation, the CIA's

proposal would deprive the courts of any ability to review the Agency's withholding decisions by determining *de novo* whether disclosure would implicate the kind of problems which led Congress to enact the withholding statute. This approach to FOIA exemption is totally inconsistent with the letter and spirit of the FOIA generally, and of the post-*Robertson* amendment to Exemption 3 in particular.

Nor would this discretion be limited to the names of the sources. The ability to protect intelligence sources from unauthorized disclosure includes not only names but other identifying details such as information obtained from the source, or information about the activities in which the source was engaged, on the theory that such disclosure could "lead to" the identification of the source. *Gardels v. CIA*, 689 F.2d 1100 (D.C. Cir. 1982). And, although the CIA must support such "lead to" claims with an affidavit, the nature of the question is such that in normal circumstances the claims are virtually immune from effective judicial review.

Thus, every "intelligence source" within the meaning of § 403(d)(3) is surrounded by a large penumbra of "lead to" information which may be withheld from disclosure even without any showing that disclosure of the information would be inimical to the national security. For example, data obtained from other agencies and the contents of public libraries could be withheld on the theory that their disclosure could lead to the identification of the agencies or the libraries from which they were obtained. Accordingly, limitless expansion of the term "intelligence source" with an exception for unreviewable CIA power to waive protection of the statute is tantamount to allowing the CIA unreviewable discretion to decide which of its activities will be disclosed and which may not.

Of course, the CIA has other secrecy needs beyond protecting intelligence sources. Indeed, as discussed more fully in the next section of this brief, other statutory protections are available to meet those legitimate needs. However, the narrow issue before the Court is not whether the CIA should be

able to withhold the identities of the MKULTRA researchers, but whether they may be withheld on the only theory which the CIA has chosen to present in its certiorari petition — that they are "intelligence sources." And on that question, the record in the case establishes that, with a few exceptions, they are not.

The researchers who performed their work in laboratories or libraries plainly did not require confidentiality to persuade their own "sources" to cooperate in their research, or for any other reason that appears in the record. Indeed, many of the researchers were actually anxious to disclose their CIA research, but had to be urged or even threatened to prevent them from doing so. *E.g.*, App. 57, 60; Pet. App. 26a. A large number of others were unaware of any CIA relation to their work, and hence secrecy cannot have been a prerequisite for their cooperation. The evidence persuaded the district court — and the CIA's brief does not dispute this finding — that, with a very few exceptions, the researchers did not either seek or receive guarantees of confidentiality before participating in MKULTRA. Indeed, as the district court observed, the CIA's evidence showing that a few researchers did desire confidentiality only serves to highlight by "stark contrast" the absence of any reason to believe that the others sought it. Pet. App. 26a. Accordingly, the vast majority of the researchers were not "intelligence sources" within the meaning of § 403(d)(3) and are not protected from disclosure by it.

D. *The Court of Appeals' Formulation Recognizes the Agency's Legitimate Secrecy Needs and Does Not Prevent the CIA From Performing Its Intelligence Mission.*

The CIA seeks to buttress its construction of § 403(d)(3) by arguing that the court of appeals' formula "could be extremely damaging to the CIA's ability to carry out its mission." Br. at 29. It posits difficulties which take two forms. First, the formula is said to require disclosure of information which could itself be damaging to the CIA. Br. at 34-40. Second, the mere existence of the standard would compromise the CIA's ability to provide an absolute assurance of confidentiality to

potential sources of information, because such sources would be aware that the assurance would be subject to judicial review. Br. at 30-34. Neither argument withstands analysis.

1. The CIA's Parade of Horribles Would Not Follow From the Decisions Below.

The CIA argues that the court of appeals' formulation would require many disclosures which would be damaging to the CIA's legitimate activities. It is contended both that the rule will lead to identification of many persons who require confidentiality and that the rule will require disclosures which would interfere, not with the CIA's ability to tap sources of information themselves, but with its legitimate efforts to conceal the nature of ongoing activities from foreign governments. The errors common to each of these apprehensions are that they either misconstrue the court of appeals' definition or ignore the availability of other statutes that protect its activities from public scrutiny.

a. The fallacy of the CIA's argument that only the traditional secret agent is comprehended by the court of appeals' formulation has already been discussed *supra* at 19-20. Travelers, journalists, and other persons who provide the CIA with information based on their contacts abroad were clearly contemplated by Congress as "intelligence sources" and qualify under the court of appeals' definition. It is obvious that the Agency would be unable to obtain the information that these sources provide without a guarantee of confidentiality. Indeed, the court of appeals in other cases has had no difficulty in finding that such contacts are intelligence sources who are protected from disclosure. *Miller v. Casey,* 730 F.2d 773 (D.C. Cir. 1984); *Afshar v. Department of State,* 702 F.2d 1125 (D.C. Cir. 1983); *Gardels v. CIA,* 689 F.2d 1100 (D.C. Cir. 1982).[7]

[7]The CIA represents, Br. at 17, that the *Sims* decisions were "apparently" not called to the court's attention in *Afshar* and *Gardels.* In fact, the meaning of *Sims I* was debated in each case both by the requesters and by the CIA itself.

b. The CIA suggests that the court of appeals would require identification of persons to whom confidentiality had to be guaranteed so long as the information was "theoretically in the public domain," even though it was not available "as a practical matter." Br. at 35-36. This argument assumes, however, that when the courts below construed the statute with an eye towards "the practical need for secrecy," Pet. App. 50a, they actually intended to disregard the practical requirements of intelligence operations. To the contrary, the courts below were extremely sensitive to the legitimate secrecy needs of the CIA, and there is nothing to support the CIA's contrary reading. The fact that the information was available from sources other than the one used by the CIA obviously bears on the need to guarantee confidentiality in order to obtain it. But if there are practical reasons why the CIA needed the information from a particular source — such as that the source was particularly reliable or convenient, as in the example posed in the CIA's brief at page 36 — the need to guarantee confidentiality to the potential source would be sufficient to warrant non-disclosure.

c. A related CIA objection is that the courts might second-guess the Agency's promise of confidentiality to a particular person, either because the promise was implicit rather than explicit, or was not in writing, and therefore not easily proved after the fact, or because the recipient of a promise was atypically leery of being publicly associated with the CIA. By requiring proof of matters which, by the nature of intelligence operations, are normally not memorialized, the decisions below would assertedly cripple the CIA's operations.

These CIA arguments, although appealing in the abstract, are flawed by their divorce from the realities of this case. Evidence about guarantees of confidentiality was sought here only because of the unique character of the information obtained by the MKULTRA researchers. The results of scientific research conducted at American universities on such subjects as the use of hypnosis as a memory enhancer and polygraph deceiver, or the optical rotatory power of solid and

liquid crystals, was not the kind that would, by itself, imply that confidentiality was necessary.

The court of appeals was at pains to emphasize that evidence would not be needed in most cases. Pet. App. 10a-11a. Here, for example, one researcher's name was allowed to be withheld simply by virtue of the nature of his subproject — a trip to a conference in the USSR. Analysis of MKULTRA Files, *supra* n.4, at 10. Moreover, the courts below did not apply the Statute of Frauds to limit proof of CIA confidentiality guarantees. The district court accepted as adequate any evidence, either of a written guarantee, an express oral guarantee, or a guarantee which was implicit in other evidence which was presented. Pet. App. 26. *E.g.*, App. 62 (expression of desire for confidentiality on a different research project several years after MKULTRA). Indeed, the district court even heard unsworn *ex parte* testimony by CIA officials with no personal knowledge about MKULTRA.[8]

Nor is it accurate to say that the researchers' desire for confidentiality was unprovable because the researchers refused to have their names on documents in the CIA's files. Br. at 31 n.10. Although such reluctance is undoubtedly true of clandestine operators, or travelers and journalists, the record in this case suggests quite the opposite conclusion. Among the documents that survived destruction in 1973 are research proposals and contracts bearing the researchers' names, as well as written promises *by* researchers *to* the CIA that the CIA connection would not be revealed by the researchers. *E.g.*, App. 52. In these circumstances, if the CIA did not provide reciprocal promises, it was not because the researchers sought to avoid documentation, but, as the district court ruled, because the researchers did not care about confidentiality. Pet. App. 24a, 26a.

[8] The affidavits offered by the CIA were extremely general, and carefully skirted the key questions of whether confidentiality either was or had to be promised by the CIA to the researchers. Moreover, as the district court noted, Pet. App. 25a, the affidavits were signed by CIA officers who were not involved in MKULTRA, despite the fact that the CIA had managed to produce officers who *were* involved to testify about the substance and procedures of MKULTRA at the congressional hearings.

Finally, the CIA objects to judicial second-guessing of confidentiality guarantees to persons who were "unreasonably or atypically leery" of open contact with the CIA. The Agency ignores the fact that the court of appeals expressly provided in this and other cases for judicial deference to sworn CIA statements by competent officials about the practical need for confidentiality or about the effects of a particular disclosure on its operations. Pet. App. 51a-53a; *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980). But if the CIA does promise confidentiality to an irrationally wary source, whose information could readily be obtained with equal reliability elsewhere, then a reviewing court should not be precluded from ruling that § 403(d)(3) does not protect that identity from disclosure.

In any event, the outcome in this case cannot properly turn on how the courts will deal with that problem if, indeed, they are ever confronted by such a source. Whatever the merits of its arguments about the need for confidentiality in other circumstances, the CIA has not shown that confidentiality was required for MKULTRA.

d. The CIA also contends that the courts below would require the identification of persons who unwittingly report information to CIA sources about foreign governments or other targets of CIA monitoring. Disclosure would lead, the CIA warns, to retaliation against the intermediary and loss of a valuable source of intelligence. Br. at 39-40 and n.15. There is no dispute about the applicable legal principles; respondents concede that the CIA may refuse to disclose information if it would lead to the identification of an intelligence source — here, the intermediary.

But here there is no such problem. The unwitting researchers in this case were funded by the CIA through a front group, the Society for the Investigation of Human Ecology, not because the researchers were unwilling to help the CIA, but because the CIA wanted to avoid publicity concerning the nature of its interests. *E.g.*, App. 55, 58, 60. Inasmuch as the Society's role in MKULTRA has been identified and the

Society dissolved, the researchers' names cannot be withheld either to protect it from disclosure, or to protect against disclosure of the MKULTRA program itself.

Finally, most of the MKULTRA information was such that, by its very nature, it could be obtained without guaranteeing confidentiality to anyone. For example, studies of reactions to alcohol after social drinking, computer analysis of bioelectric response patterns, and investigations of the transfer and storage of energy in organic systems are plainly of a different order than information about agricultural problems or work stoppages that a CIA agent may obtain from travelers to Kiev or Krakow. The agent, the travelers and the Ukrainians and Poles to whom they talked would be sources of intelligence; in this case, by contrast, neither the Society nor the researchers to whom it turned for scientific services are protected from disclosure. Again, the CIA's counterexamples do not provide a reason to reject the court of appeals' decision in this case.

e. The CIA professes concern that an FOIA requester could force the Agency to identify sources via a more circuitous route. It hypothesizes the case of a person who supplies both information of a sort which makes him or her an intelligence source and other information which is readily available from the public. The CIA argues that it might be required to disclose the nonintelligence relationship, despite the fact that the source would plainly be compromised in its other capacity as well. Br. at 36-37.

It is difficult to understand why the CIA complains about this possibility, inasmuch as respondents never contested the basic legal theory which the CIA asserts. Indeed, the Agency completely prevailed in the district court on this argument in this very case, and thus was permitted to withhold the identities of half of the MKULTRA researchers. In any event, the error of this argument is that it is always open to the Agency to prove that identification of a person with whom it had a non-intelligence contact would "lead to" disclosure of intelligence contacts.

f. The CIA argues that the court of appeals' formula would also require it to reveal the name of an "obscure Eastern European technical journal" to which it subscribes, on the theory that the journal is publicly available. Br. at 36. Although it seems doubtful both that there is any Eastern European publication to which the CIA does not subscribe, and that our adversaries do not assume as much, the example still does not advance the CIA's point. If non-disclosure were not "innocuous," *see supra* at 22, the Agency would surely be able to establish that disclosure of *its* subscription would cause sensitive information to be deleted from or misinformation to be added to the journal, and in that sense confidentiality would be necessary to obtain the information. Moreover, revelation of the indirect subscription might disclose intelligence methods, which are also protected by § 403(d)(3), by revealing the manner by which the journals were obtained undercover. In this case, by contrast, the manner in which the MKULTRA research was initiated, funded, and received by the CIA has been revealed, and the Agency has expressly renounced any reliance on the exemption for intelligence methods. CIA Answers to Plaintiffs' Interrogatories, February 26, 1979, at p. 57.

g. Finally, the CIA argues that it often keeps its contacts secret, not so much because the persons from whom it obtains information insist upon confidentiality, but because the Agency itself wishes to conceal from our adversaries the topics of its interest or the targets of its monitoring. The CIA postulates that revelation of these matters could damage the national security in a variety of ways — by making the targets more elusive; by disclosing the methods by which the CIA operates; and by encouraging others to take countermeasures. The Agency contends that, by confining the intelligence source exemption to only one of the many reasons for CIA secrecy, the court of appeals' formulation severely hampers the intelligence-gathering mission.

There are, however, two flaws in the CIA's analysis, one related to this case, and one of a more general nature. First,

the argument that the CIA often needs to be able to conceal the topics in which it is interested simply has no bearing here. The fact that the CIA was interested in behavioral modification techniques and mind-altering drugs, and conducted a series of research projects on these topics in the 1950's and early 1960's, has already received "broad publicity." CIA Br. at 4. The CIA has disclaimed any interest in concealing from public scrutiny the details of the program, CIA Reply Brief in *Sims I*, at pp. 11-12; they are secret only because of the Agency's own document destruction activities.

But second, and more important, the fundamental error was not committed by the court of appeals, but by the CIA in trying to make the intelligence source exemption bear the full burden of protecting all of the CIA's secrecy interests. Indeed, the legislative debates which the CIA quotes extensively in its brief cut against its argument that § 403(d)(3) protects the CIA's own interest in avoiding enemy knowledge of its interests. For Congress was evidently concerned about the "deadly peril" faced by intelligence sources and about the fact that such sources would "close up like a clam" without protection. CIA Br. at 20. Thus was enacted § 403(d)(3), which does not authorize the Director to "protect the CIA from disclosure of the topics of its interest," but to "protect intelligence sources . . . from unauthorized disclosure."

Section 403(d)(3)'s protection for intelligence sources, of course, is but one of the many defenses available to the CIA in keeping its secrets secret. Even when that defense is not available, it may invoke the intelligence methods portion of § 403(d)(3); it may invoke 50 U.S.C. § 403g to protect the names and other data concerning personnel it employs; and, of course, it may invoke the national security exemption of the FOIA, 5 U.S.C. § 552(b)(1), if the records are properly classified.

In this case, however, the Agency has elected not to rely on these other alternatives despite the contrary urgings by the district court. It may have made this choice because these exemptions do not apply in this case, or as Judge Oberdorfer

said to the CIA without contradiction during an *ex parte* hearing, it may have been done in order to make a test case which could expand the limits of the "intelligence sources" statute. App. 9. *See also* Pet. App. 60a (per Markey J.). Whatever the reason, the CIA cannot complain that its other secrecy interests, none of which is presently applicable to MKULTRA files, must be considered when it has failed to invoke the statutory defenses which protect them.

2. *The CIA Demand for Protection From the Perception of Its Inability to Prevent All Disclosures Is Tantamount to a Plea for Exemption From Judicial Review Under the FOIA.*

The CIA examples discussed in the previous section were predicated on inaccurate characterizations of the decisions below or incomplete views of the totality of defenses available to the CIA in an FOIA suit. The Agency's final argument, by contrast, is that by holding out even a possibility that in some cases the CIA will have to disclose some information which leads to the identification of a person with which it has had contact, the court of appeals' formulation will inhibit the future gathering of intelligence. By this argument, the CIA is seeking the sort of exemption from scrutiny under the FOIA which Congress has previously denied even with respect to Exemption 1 claims that release of the information sought could endanger the national security.

What matters here is not whether there is an actual disclosure of an intelligence source in any given FOIA case; rather, the CIA is concerned about the "appearance of confidentiality." Br. at 31, quoting *Snepp v. United States,* 444 U.S. 507, 509 n.3 (1980). Even if it is unlikely that a person's identity will be disclosed, the CIA argues that a perception that disclosure is even possible may discourage the assistance of persons who will refuse to provide needed information without an ironclad guarantee of confidentiality, even though they would themselves be intelligence sources under the court of appeals' formulation. Thus, the CIA seeks protection against its perceived inability to keep its sources secret.

The basic flaw in this argument is that it proves too much.

Even if the CIA wins this case, *some* potential sources may be deterred from providing the CIA with information simply because the CIA is subject to the FOIA, which in turn requires *de novo* judicial review of the Agency's decisions to withhold records. It is at least theoretically possible that the federal courts could mistakenly require the CIA to reveal some information which would identify an individual or organization that would prefer to avoid identification. Although a CIA victory expanding the definition of intelligence source here might reduce that possibility, the possibility remains, and that may in turn discourage intelligence sources, although perhaps fewer of them. Indeed, the Agency has repeatedly advised the Congress of its concerns in this regard, *see, e.g.,* S. Rep. 98-305, 98th Cong., 1st Sess. 5-8 (1978), but Congress has declined to give the Agency a total exemption from the FOIA such as the one which the National Security Agency has received, 50 U.S.C. § 402 note, Pub. L. 86-36, § 6, that would be needed to cure the perception problem if Congress found that there really was a problem of the sort claimed by the CIA.

Even where a request is for information whose disclosure would assertedly imperil the national security, Congress has provided for *de novo* judicial review of agency classification decisions. Although this Court originally construed the FOIA to require courts to defer automatically to executive decisions to withhold records in the interests of the national defense or foreign policy, *Environmental Protection Agency v. Mink,* 410 U.S. 73 (1973), Congress amended Exemption 1 to require judicial scrutiny of the national security claims.[9] The CIA's claims under § 403(d)(3) are nothing less than an attempt to revive the rule of *Mink*, without even a national security justification, and in the face of an amended Exemption 3 that was intended to ensure that Congress through the courts, and

[9] That judicial review is deemed by Congress to be vital in the national security area is underscored by the fact that Congress passed the 1974 amendments over President Ford's veto, which singled out the revised Exemption 1 as the primary objection to the amendments. H. Doc. No. 93-383, 93rd Cong., 2d Sess. (1974).

not the agencies, should be making the policy decisions about withholding.

Stated another way, the CIA's real problem rests in the fact that "intelligence source" is a finite category. Some persons are intelligence sources, and some persons are not intelligence sources. Because the FOIA requires courts to review exemption claims, it is the courts' task to decide who are intelligence sources, and the CIA's alleged perception problem will remain so long as there is a boundary and the courts, rather than the CIA, have the ultimate responsibility for mapping it.

But the only way to eliminate the problem, if one were shown to exist, would be to allow the Director to invoke the intelligence source exemption in his sole discretion, without any judicial review. That approach, however, is inconsistent with the basic FOIA principle of *de novo* review and in particular with Exemption 3, which includes only statutes which narrowly confine agency discretion to withhold.

* * *

If the CIA were primarily concerned with the dangers of disclosure here, it would have litigated this case very differently. It would have invoked the national security exemption. Or it would have acceded to the repeated urgings of the district court and contacted the researchers to gain information about their expectations of confidentiality. Or it would have presented affidavits from persons involved in MKULTRA, instead of officers with no direct knowledge about it. In short, it would have taken every precaution to prevent possible disclosure of the MKULTRA researchers.

For the CIA, however, this is a test case in which it is basically unconcerned with whether the MKULTRA researchers are identified. Rather, by presenting an extreme case, while denying the Court any recourse to other national security defenses, the Agency hopes to induce the Court to expand the statutory term of "intelligence source" and protect against a perception problem which it has been unable to persuade Congress to cure. As Chief Judge Markey said in urging that the names be disclosed, "It does the Agency no injustice

to remark that one who appears to have thrown down a gauntlet should not be surprised when it appears to have been picked up." Pet. App. 60a. We urge the Court to reject the CIA's challenge and to affirm the portion of the judgment of the court of appeals that addresses the status of the researchers themselves.

II. THE CIA FAILED TO PRESENT EVIDENCE TO ESTABLISH THAT DISCLOSURE OF THE REMAINING INSTITUTIONS AT WHICH THE MKULTRA RESEARCHERS WORKED WOULD LEAD TO THE IDENTIFICATION OF INTELLIGENCE SOURCES.

The district court recognized that there was no evidence in the record that the institutions at which the researchers were employed during MKULTRA had demanded or desired confidentiality in order to participate in the program. Pet. App. 27a. Indeed, in almost all instances, the CIA contacted the researchers directly, insisting that the institutions not be informed. *E.g.*, App. 60. Accordingly, the institutions themselves were never sources of intelligence.

However, picking up a suggestion advanced by CIA's counsel at oral argument following the remand from the court of appeals, the district court ruled that, because of "the possibility that [disclosing the institutions] might lead to the indirect disclosure of PRs," the CIA would be permitted to withhold the names of all institutions which employed the researchers who had been found to be intelligence sources. Pet. App. 27a. Although the court of appeals did not specifically address respondents' appeal from this portion of the district court's ruling, by affirming "all other aspects" of that decision, Pet. App. 11a, it apparently intended to affirm in this respect as well.

In objecting to this ruling, respondents do not dispute the general proposition that § 403(d)(3) allows the Agency not only to refuse to release the names of intelligence sources, but also to withhold other information which could lead to the identification of an intelligence source. *See Gardels v. CIA*,

689 F.2d 1100 (D.C. Cir. 1982). However, under the FOIA the agency bears the burden of establishing that any claimed exemption is in fact applicable. 5 U.S.C. § 552(a)(4)(B). This requires the CIA to present evidence, not just arguments of counsel, to support its "lead to" claim. Not only did the Agency fail to present evidence, but the only record evidence bearing on the question pointed in the opposite direction.[10]

Thus, before the CIA's counsel decided to make its "lead to" argument, its affiant, M. Corley Wonus, made the following concession:

> With respect to institutions whose identities have not been released, the CIA admits that the *only* viable basis for continuing withholding their identities is a threat of damage to existing intelligence-related arrangements *with the institutions* or exposure of past relationships *with the institutions.* (emphasis added)
> App. 27.

Moreover, former CIA director Stansfield Turner also implicitly acknowledged this point when, in his affidavit, he described the reasons why some institutions' names had been released and others had not. Respondents had argued that the voluntary release of more than two-thirds of the names of the institutions indicated CIA recognition that the institutions were not themselves intelligence sources. Admiral Turner's response was that the Agency's obligations under § 403(d)(3) ended when an institution gave its consent to identification. Pet. App. 91a, 92a.

This statement is important for two reasons. It is evident that Admiral Turner did not believe that identification of the consenting institutions could lead to the identification of a researcher who worked there. Indeed, the subprojects for each

[10] In fact, the CIA's original "lead to" claim was that identifying the researchers would lead to the identification of the institutions, rather than the present theory that naming the institutions would lead to disclosure of the researchers. CIA Memorandum in Opposition to Motion for Summary Judgment, at 6 (April 2, 1979).

institution were listed by the CIA adjacent to the institution, as shown in the addendum to this brief, thus specifying the MKULTRA research done at each institution. Moreover, the list of disclosed institutions includes not only such academic giants as Columbia, Harvard and Stanford Universities, but also smaller educational bodies such as the Center for International Studies and Montana State College, and various small companies and public agencies. There is no evidence and no explanation showing how the size and nature of the undisclosed institutions differ from the identified ones, such that identification of the former is more likely to lead to indirect exposure of researchers who worked for them than did naming the latter.

Indeed, although almost all of the institutions, unidentified as well as identified, were unaware of the CIA's sponsorship of MKULTRA work, the CIA told each of them that researchers had been engaged in MKULTRA subprojects there. If disclosure of the institutions would lead to the *respondents'* identification of the researchers, presumably the letters to the institutions would have had at least the same effect. Given the Agency's evident lack of concern about any "lead to" effect of its letters to the institutions, it is apparent that its counsel's "lead to" claim in this case is an unsupportable afterthought.

In the face of these contrary indications, and in light of its burden under the FOIA to justify withholding, it was incumbent upon the CIA to present evidence to support its "lead to" claim. As Judge Wilkey stated in *Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980), affidavits on this point would have received "substantial weight," inasmuch as they would advise the court about factual matters within the area of the Agency's national security expertise. Instead of presenting such evidence, however, the CIA rested solely on arguments by its lawyers. Because it submitted no evidence in support of its belated and illogical "lead to" claim, the Agency failed to carry its burden of proof and should have been required to identify all of the institutions.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed insofar as it relates to the MKULTRA researchers. Insofar as it pertains to the institutions, the judgment of the court of appeals should be reversed, and the case remanded with instructions to enter partial summary judgment in favor of the respondents.

Respectfully submitted,

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON
DAVID C. VLADECK

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents-Petitioners

August 22, 1984

ADDENDUM

MKULTRA — Institutional Notifications

American Psychological Association [deleted] American Psychological Association 1200 17th Street, N.W. Washington, D.C. 20036	Subprojects 107, 125
Bacteriological and Pharmaceutical Consultants, Inc. [deleted]	Subprojects 78, 110 (also MKSEARCH)
[deleted]	Subproject 22
[deleted]	Subproject 142
Bio-Research, Inc. not sent	Subprojects 91, 94
[deleted]	Subprojects 8, 10, 63, 66, 75, 114 (also BLUE/ART)
[deleted]	Subprojects 53, 120
Brastendahl Foundation See H.J. Rand Foundation	
Butler Hospital and Health Center Butler Hospital and Health Center 333 Grotto Ave. Providence, Rhode Island 02906	Subprojects 66, 114
Children's International Summer Villages, Inc. [deleted] RFD #1 Ellsworth, Maine 04605	Subproject 103
[deleted]	Subprojects 7, 27, 40

Columbia University Subprojects 123, 130
[deleted]
Columbia University
Morningside Heights
New York, New York 10027

Cornell University and the Medical School at Cornell Subprojects 48, 61, 65, 81, 1 (also BLUE/ART)
[deleted]
Cornell University and Medical School
at Cornell
Ithaca, New York 14857

[deleted] Subprojects 51, 52

University of Denver Subprojects 5, 29, 49
[deleted]
University of Denver
2301 South Gayford Street
Denver, Colorado 80210

[deleted] Subproject 129

The Educational Testing Service Subproject 77
[deleted]
The Educational Testing Service
Rosedale Rd.
Princeton, New Jersey 08540

Emory University Subprojects 28, 47
[deleted]
Emory University
Atlanta, Georgia 30322

[deleted] Subprojects 116, 146 (also MKSEARCH)

University of Florida Subproject 126
[deleted]
University of Florida
Gainsville, Florida 32601

[deleted] Subprojects 23, 35, 37, 45, 55

George Washington University Subprojects 57, 129
[deleted]
George Washington University
Washington, D.C. 20052

[deleted] Subproject 129

Harvard University Subproject 84, 92
[deleted]
Harvard University
Cambridge, Massachusetts 02138

[deleted] Subproject 102

[deleted] Subproject 104, 143
University of Houston
Houston, Texas 77004

University of Illinois Subproject 9, 26, 44 (also BLUE/ART)
[deleted]
University of Illinois
Urbana, Illinois 61801

[deleted] Subproject 9

University of Indiana Subproject 67, 112
[deleted]
University of Indiana
Bloomington, Indiana 47401

Ionia State Hospital for Criminally Insane
see Psychopathic Clinic of the
Recorders Courts, City of Detroit

The Johns Hopkins University — Subproject 87
Charles and 34th Streets
Baltimore, Maryland 21218

[deleted] — Subprojects 23, 73, 147

Eli Lilly Company — Subprojects 6, 18 (also BLUE/ART)
[deleted]
Eli Lilly Company
307 E. McCarty St.
Indianapolis, Indiana 46206

[deleted] — Subprojects 9, 28

University of Maryland — Subproject 59
[deleted]
University of Maryland
College Park, MD 20742

Massachusetts Institute of Technology — Subproject 90
[deleted]
Massachusetts Institute of Technology
Center for International Studies
Cambridge, Mass. 02139

[deleted] — Subproject 38

University of Minnesota — Subprojects 5, 25 (also BLUE/ART)
[deleted]
University of Minnesota
Minneapolis, Minn.55455

Montana State College — Subproject 22
[deleted]
Montana State College
Bozeman, Montana 59715

J.P. Morgan and Co., Inc. — Subproject 58
[deleted]
J.P. Morgan and Co., Inc.
23 Wall Street
New York, N.Y. 10015

[deleted] — Subprojects 7, 27, 40 (BLUE/ART)

New Jersey Reformatory at Bordentown — Subproject 47
New Jersey Reformatory at Bordentown
Box 500
Bordentown, New Jersey

New Jersey Neuropsychiatric Institute — Subproject 47 (also MKSEARCH)
New Jersey Neuropsychiatric Institute
Box 100
Skillman, N.J. 08558

[deleted] — Subprojects 134, 137

Ohio State University — Subproject 96, 101
[deleted]
Ohio State University
660 Parrington Oval
Columbus, Ohio 43210

University of Oklahoma — Subprojects 43, 102
[deleted]
University of Oklahoma
Norman, Oklahoma 73019

Panoramic Research, Inc. — Subproject 94
not sent

[deleted] — Subprojects 12, 32

Pedlow Nease Chemical Company, Subprojects 20, 31, 41
[deleted]
Nease Chemical Company, Inc.
Manufacturers of Organic Chemicals
Lock Haven, Pennsylvania

University of Pennsylvania [deleted]
[deleted]
University of Pennsylvania
Philadelphia, Pa. 19174

Pennsylvania State University Subprojects 99, 100, 118, 139
[deleted]
201 Old
University Park, Pennsylvania 16802

Princeton University Subprojects 1, 88
[deleted]
Princeton University
Princeton, N.J. 08540

Psychopathic Clinic of the Recorders Court Subproject 39
[deleted]
Ionia State Hospital
Ionia, Michigan 48846

Queens College Subproject 98
[deleted]
City University of New York
65-30 Kissena Blvd.
Flushing, New York 11367

Rutgers University Subproject 69
[deleted]
Rutgers University
New Brunswick, N.J. 08903

H.J. Rand Foundation Subproject 79
[deleted]
Brastendahl Foundation
12720 Lake Shore Drive
Cleveland, Ohio 44110

[deleted] Subproject 133

Resources Research, Inc. Subproject 106
Not sent

University of Richmond Subproject 23
[deleted]
University of Richmond
Richmond, Va. 23173

[deleted] Subprojects 17, 46, 148
(also BLUE/ART)

[deleted] Subproject 146

[deleted] Subprojects 124, 140
(also MKSEARCH)

[deleted] Subproject 21

[deleted] Subproject 11

Stanford University School of Medicine Subprojects 70, 71, 86, 85, 2
[deleted]
Stanford University School of Medicine
Stanford, California 94305

[deleted] Subproject 109

University of Texas Subproject 138
[deleted]
University of Texas
601 Colorado Street
Austin, Texas 78701

Texas Christian University Subproject 119
[deleted]
Texas Christian University
Fort Worth, Texas 76129

University of Wisconsin Subprojects 97, 105
[deleted]
University of Wisconsin
Madison, Wisconsin 53706

MKULTRA Additional Institutions Notified

1. *Atlanta Federal Penitentiary* (Subproject 47)
[deleted]
Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

2. *Bureau of Narcotics* (Subprojects 3, 14, 16, 42 132, 149)
[deleted]

Drug Enforcement Administration
1405 I Street, N.W.
Washington, D.C. 20537

3. *Computer Analysis* (Subproject 125)
Unable to locate — not sent

4. [deleted] (Subproject 58 — Cosponsor)

5. *Leler University of Georgia* (Subproject 129)
Unable to locate — not sent

6. *Lexington Kentucky Narcotics Farm* (Subproject 73)
National Institute on Drug Aubse
11400 Rockville Pike
Rockwell Building
Rockville, Maryland 20852

7. *McGill University* (Subproject 68, 121)
[deleted]
P.O. Box 6070
Montreal, Quebec H 3C 361

8. *National Institute of Heath* (Subproject 125)
[deleted]
900 Rockville Pike
Bethesda, Maryland 20014

9. *National Institute of Mental Health* (Subproject 125)
[deleted]
Director
Parklawn Building Room 17-99
5600 Fishers Lane
Rockville, Maryland 20851

10. *National Philosophical Society* (Subproject 58 — Cosponsor)
Unable to locate — not sent

11. [deleted] (Subproject 126)

12. *National Research Council* (Subproject 126)
Unable to locate — not sent

13. *Office of Naval Research* (Subproject 7 — Cosponsor, also 54 — canceled)
[deleted]
Assistant Secretary for Health
800 N. Quincy Street
Arlington, Virginia 22217

14. *Public Health Service* (Subproject 7 — Cosponsor, also 36, 40, 46)
[deleted]
Assistant Secretary for Health
5600 Fishers Lane
Rockville, Maryland 20857

15. [deleted] (Subproject 94)

16. [deleted] (Subproject 7 — Cosponsor also 18, 40, 146)

17. [deleted] (Subprojects 108, 111, 127)

18. *Veterans Administration Center* (Subproject 125)
Martinsburg, W. Virginia
[deleted]
Martinsburg, W. Virginia 25401

19. *Worcester Foundation for* (Subproject 8)
Experimental Biology
Unable to locate — not sent

Nos. 83-1075 and 83-1249

IN THE

Supreme Court of the United States

October Term, 1984

CENTRAL INTELLIGENCE AGENCY
and WILLIAM J. CASEY,
Director of Central Intelligence,
Petitioners-Respondents,

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
Respondents-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF ON THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON
DAVID C. VLADECK
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents-Petitioners

October, 1984

CASILLAS PRESS INC - 1717 K ST NW WASHINGTON DC - 223-1220

TABLE OF AUTHORITIES

Cases: Page

Statutes:

Miscellaneous:

IN THE

Supreme Court of the United States

October Term, 1984

Nos. 83-1075 and 83-1249

CENTRAL INTELLIGENCE AGENCY
and WILLIAM J. CASEY,
Director of Central Intelligence,
Petitioners-Respondents,

v.

JOHN CARY SIMS and SIDNEY M. WOLFE,
Respondents-Petitioners.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' SUPPLEMENTAL BRIEF ON THE CENTRAL INTELLIGENCE AGENCY INFORMATION ACT

After respondents filed their brief on the merits, Congress amended the National Security Act of 1947, upon which petitioners rely to support their claim that the identities of the principal researchers and institutions involved in the Central Intelligence Agency's MKULTRA Program are exempt from disclosure pursuant to Exemption 3 of the Freedom of Information Act. This brief, filed pursuant to this Court's Rule 35.5, discusses the effect of the amendment, enacted as the Central Intelligence Agency Information Act, Pub. L. 98-477, on October 15, 1984.

The new legislation does not by itself dispose of the legal issues raised by this case, not only because it is not retro-

active, but also because it does not change the language of that portion of the National Security Act which is at issue here, 50 U.S.C. § 403(d)(3). However, the changes made in other parts of the statute, and the reasons given for those amendments, not only eliminate the public importance of this case on which the CIA relied in seeking certiorari, but also severely undermine the CIA's arguments by revising the context in which section 403(d)(3) must be construed.

As we more fully discuss below, the amendment affects this case in three respects. First, Congress has eliminated any basis for the "perception" argument upon which the CIA relies so heavily, Br. at 29-34, and which was advanced as the principal justification for the writ of certiorari. Petition at 8-12. Second, Congress has reaffirmed the critical importance of *de novo* judicial review in the implementation of the FOIA, even as applied to the CIA's most sensitive files. Finally, a review of the amendment's legislative history reaffirms that the "sources" Congress wishes to protect from disclosure are those whose willingness to participate depends on the CIA's protection of the confidentiality of their involvement — the very sources which are comprehended by the formulation of the court of appeals below. We discuss these effects of the Act in turn.[1]

[1]The legislative history consists of three committee hearings, three committee reports, and three floor debates, which occurred in the following chronological order. The Senate Select Committee on Intelligence held hearings on June 21, June 28 and October 4, 1983, *S.1324, An Amendment to the National Security Act of 1947*, S. Hrg. 98-464 (1983) (here cited as "Senate Intelligence Hearings"), and issued a report on November 9, 1983. *Intelligence Information Act of 1983*, S. Rep. 98-305 (1983) (here cited as "Senate Intelligence Report"). The Senate passed its bill on November 17, 1983, following a debate reported at 129 Cong. Rec. S16742-S16746 (daily ed.). The Subcommittee on Legislation of the House Permanent Select Committee on Intelligence held a hearing on February 8, 1984, *Legislation to Modify the Application of the Freedom of Information Act to the Central Intelligence Agency* (here cited as "House Intelligence Hearing") and produced a report on May 1, 1984. *Central Intelligence Agency Information Act*, H. Rep. 98-726, Part 1 (1984) (here cited as "House Intelligence Report"). The Government Information, Justice and Agriculture Subcommittee of the House Committee on Government Operations held a hearing on May 10, 1984, *CIA Information Act* here cited as "House Gov't Ops. Hearing"), and issued a report on September 10, 1984. *Central Intelligence Agency Information Act*, H. Rep. 98-726, Part 2 (1984) (here cited as "House Gov't Ops. Report"). The House then passed H.R. 5164 on September 19, 1984, following a debate reported at 130 Cong. Rec. H9621-H9631 (daily ed.). The Senate acceded to the House bill on September 28, 1984, after a debate reported at 130 Cong. Rec. S12395-S12397 (daily ed.), and the President signed the Act on October 15, 1984. A copy of each of the Hearings and Reports has been lodged with the Clerk. All Congressional Record citations in this brief refer to the daily edition.

1. The most important consequence of the new legislation is to deprive the CIA of the policy argument on which its case is premised. According to the CIA, the very fact of judicial review under the court of appeals' formulation would cause the CIA's intelligence sources to perceive that the CIA could not protect their identities from disclosure; this perception, in turn, was said to interfere with the recruitment and retention of such sources. In support of the legislation that became Public Law 98-477, the Agency made the very same policy arguments to Congress that it has advanced in this Court — that the process of reviewing its files in response to FOIA requests caused the same perception problem and that that problem would be eliminated by passage of the CIA Information Act. However, as we show below, Congress not only did not agree that the perception argument was a serious one, but indeed decided that whatever problem existed would be eliminated by the bill. This problem, therefore, cannot be advanced as the guiding principle for construing section 403(d)(3).

The origins of Public Law 98-477 lie in the Agency's efforts to obtain a complete exemption from the FOIA. Senate Intelligence Report at 7-8. However, Congress was unwilling to grant that request. To the contrary, it concluded that the FOIA plays a vital role in maintaining public confidence in our government, "particularly in agencies like the CIA." House Intelligence Report at 8-9. Thus, the CIA was forced to seek a narrower amendment – the exclusion of certain operational and related files from the process of search and review of records requested under the FOIA.

As enacted, Public Law 98-477 does not change the substantive standards for withholding any CIA records for which a search is required; instead, it exempts the CIA's "operational files" from the entire process. § 701(a). That term is given a precise definition to include only three separate categories of files found, respectively, in the Directorate of Operations, § 701(b)(1), the Directorate of Science and Technology, § 701(b)(2), and the Office of Security, § 701(b)(3). In addition, to assure that the exemption would not permit the Agency to conceal abuses of its authority, Congress provided that access to operational files would continue for requests by individuals for information about themselves, § 701(c)(1), for information relating to "special activities" (i.e., covert actions) whose existence is not exempt from disclosure, § 701(c)(2), and for matters which have been investigated by specific congressional or executive bodies for an impropriety or illegality. § 701(c)(3).[2]

[2]The Act does not apply to actions filed before February 7, 1984. § 4. Even absent this non-retroactivity provision, the records sought here would not be protected from disclosure because MKULTRA has been investigated by Congress and others, and thus comes within the exception in section 701(c)(3). In addition, files reflecting programs such as MKULTRA "do not meet [the bill's] definition of operational files." 130 Cong. Rec. H9623 (Sept. 17, 1984). Indeed, the CIA explicitly agreed that the MKULTRA files would not be covered by the Act. *See* CIA analysis of categories of documents revealing CIA research programs at universities, Categories C24, C27 and C39, House Intelligence Hearing at 117-118, 124-125 (acknowledging that such documents are not "operational files" and are otherwise not exempted by the legislation). Thus, even if the search and review in this case had not already been conducted, the amendment would not enable the CIA to refuse to process respondents' request under the Act.

The Agency presented several arguments in support of this proposal – (1) information in such files was rarely required to be disclosed after the process of search, review and application of FOIA exemptions for classified materials, as well as section 403(d)(3); (2) reviewing these highly sensitive records required experienced officers to be taken away from other tasks, and thus imposed a great administrative burden that could not be justified in light of the limited amount of information actually disclosed; (3) the administrative backlog created by the need for extreme care in the search and review process for operational files produced two to three year delays in responding to FOIA requests; and (4) sensitive files had to be exposed to FOIA reviewers who otherwise had no reason to see them. House Intelligence Report at 9-17; Senate Intelligence Report at 10-11. These arguments were received sympathetically by the Congress.

A fifth argument was presented by the CIA in support of the legislation, and in fact was touted as the most compelling reason for passage. In many respects tracking the arguments which it has advanced in this Court, the Agency argued that the FOIA process had damaged the CIA's ability to recruit intelligence sources and to elicit cooperation from foreign intelligence services. See House Intelligence Hearing at 11-12; Senate Intelligence Hearing at 6-8, 12-13. Quoting from the partial dissent of Judge Bork

in this very case (*see* Pet. App. 13a), the CIA's representatives contended that the process of search and review created a perception on the part of many intelligence sources and intelligence services that the CIA could not provide them with an ironclad guarantee of confidentiality. Senate Intelligence Hearing at 13. According to the Agency's Deputy Director, despite the fact that intelligence sources are not in fact identified under the FOIA, "the key point is that those sources . . . have an entirely different perception." Senate Intelligence Hearings at 7. By eliminating search and review of operational files, he concluded, the legislation "will do away with the perception that a number of our sources have that they are threatened because of the present FOIA Act." *Id.* at 20. Moreover, the CIA, through its principal spokesman on the bill, Deputy Director John McMahon, guaranteed that the legislation resolving the problem was so satisfactory that the Agency would not seek further relief from the FOIA. *Id.* at 24-25; Senate Intelligence Report at 8; 130 Cong. Rec. H9631 (Sept. 17, 1984) (Rep. Mazzoli).[3]

Although the CIA's other claims were largely accepted, Congressional reaction to the CIA's perception argument was decidedly tepid. The intelligence committees of both the House and the Senate found that any perception

[3]Congress was fully aware both of the decisions of the court of appeals in this case and of the CIA's displeasure with them, yet did nothing to amend section 403(d)(3) to eliminate the CIA's objection. For example, at the House Intelligence Hearing conducted more than two months after the Agency's petition for certiorari had been filed in this Court, both this case and the CIA's views about it were specifically discussed. Hearing at 22, 26. Yet not only did Congress make no changes in section 403(d)(3) or otherwise attempt to overturn the decision below; it also elicited a commitment from the CIA not to seek any further FOIA relief. Senate Intelligence Report at 8; House Intelligence Report at 8 n. 5.

problems of intelligence sources did not outweigh the public benefits of the FOIA:

> In a free society, a national security agency's ability to serve the national interest depends as much on public confidence that its powers will not be misused as it does on the confidence of intelligence sources that their relationships with the CIA will be protected.
>
> House Intelligence Report at 8-9; Senate Intelligence Report at 13. *See also* 130 Cong. Rec. S 12397 (Sept. 28, 1984).

Although the Senate Intelligence Committee had proposed a legislative finding acknowledging the perception problem as one of several reasons warranting passage of the legislation, Senate Intelligence Report at 2, ¶ 8, *see also id.* at 12 (relying on McMahon statement quoted supra p. 6), the House committees disagreed and the finding was deleted from the statute.[4] As the House Intelligence Committee explained, "The Committee remains skeptical of the validity of the perception problem and

[4]The House committee reports must be regarded as more authoritative than that of the Senate committee. The Senate bill, S. 1324, was passed first, in 1983, and a substantially similar bill, H.R. 4431, was introduced by Representative Whitehurst, the ranking minority member of the House Intelligence Committee's Subcommittee on Legislation. House Intelligence Hearing at 1, 95-104. A substantially different version, H.R. 3460, was introduced by Representative Mazzoli, the subcommittee chairman. *Id.* at 1, 91-94. After the House Intelligence Hearing was completed, Representatives Mazzoli, Whitehurst and others introduced H.R. 5164, which embodied the Mazzoli bill and several amendments. House Gov't Ops. Hearing at 2-9. H.R. 5164 was endorsed by both House committees and passed by the House. The Senate then abandoned its own bill, which had been more favorable to the CIA, and passed the House bill without amendment. Because the House reports more closely track the bill that was ultimately enacted, they are more persuasive legislative history than the Senate report.

does not consider it to be a major factor" supporting the legislation. House Intelligence Report at 10. The House Government Operations Committee was even firmer: it concluded not only that the perception argument was flawed, but also that "the unwarranted perceptions of foreign intelligence sources about the operations of the FOIA do not provide justification for changes in the law." House Gov't Ops. Report at 8. And all three committees agreed that "enactment of H.R. 5164 will change whatever perceptions need changing." House Intelligence Report at 10. *See also* Senate Intelligence Report at 8 (bill sends a "clear signal to our sources . . . that the information which puts them at risk will no longer be subject to the [FOIA] process"); House Gov't Ops. Report at 8 (to the extent that sources are afraid, correction of perceptions is a welcome byproduct of the bill).

Having failed to persuade Congress that the "perception argument" poses a significant problem, and having obtained passage of amendments to the National Security Act by assuring Congress that the amendments would eliminate the need for further FOIA relief, the CIA's attempt to resuscitate the perception problem in its briefs to this Court should be rejected. Indeed, because the perception argument was the heart of the justification for certiorari, Pet. at 8-12, the writ should be dismissed because the case no longer presents an issue of substantial public importance.

2. In addition to eliminating the CIA's perception argument, the CIA Information Act undercuts another persistent theme of the Agency's arguments in this Court, to the effect that judicial review of Agency determinations of who is an intelligence source is inconsistent with the National Security Act. The CIA's initial position before the Senate Intelligence Committee was that there should be

no judicial review of the Agency's determinations about which of its files are "operational." Senate Intelligence Hearings at 23 (any kind of judicial review would defeat what CIA hopes to accomplish by the legislation). *See also id.* at 51-52. The Senate Committee rejected this extreme position and adopted a judicial review provision that combined *de novo* and deferential standards of review. Senate Intelligence Report at 3-4, § 701(e). By the time of the House Intelligence Hearing, the CIA had accepted the principle of some judicial review, but opposed *de novo* review. Thus, testifying before the House Intelligence Committee, CIA attorney Edward Page Moffett, one of the Agency's counsel in this very case, noted that under current law, a court could substitute its judgment for the CIA in deciding whether an individual qualified for protection as a source. Hearing at 26. CIA and other government witnesses argued that such *de novo* review should not apply to decisions made under the amendment. *Id.* at 34-38. The issue of the appropriate standard for judicial review was the thorniest issue during the deliberations of the House committees. House Intelligence Report at 32-36; 130 Cong. Rec. H9627 (Sept. 17, 1984) (Rep. Kindness). After devoting extensive consideration to this issue, the House committees reported a bill which retained in section 701(f) the same *de novo* review as currently required by 5 U.S.C. § 552(a)(4)(B), albeit with modified procedures for creating the record upon which review would be conducted. The CIA found this compromise acceptable.

Thus, just as Congress was not persuaded of the CIA's claimed need for a total FOIA exemption and of the significance of the perception problem, Congress rejected the CIA's attack on *de novo* judicial review. To the contrary, Congress concluded, just as it had in 1966 when the FOIA was passed, and in 1974 when the Act was amended to overrule *EPA v. Mink*, 410 U.S. 73 (1973), "that *de novo*

judicial review is essential to ensure effective CIA implementation of the [FOIA] and to maintain public confidence in the implementation of the Act." House Intelligence Report at 32-33; Senate Intelligence Report at 43-44. *See also* 130 Cong. Rec. H9623 (Sept. 17, 1984) (Rep. Boland) ("the cornerstone of FOIA review and . . . the bedrock of review under H.R. 5164"), H9628 (Sept. 17, 1984) (Rep. Whitehurst). Surely, if *de novo* judicial review is required even with respect to "these most sensitive operational files," 129 Cong. Rec. S16743 (Nov. 17, 1983) (Sen. Goldwater), it is equally necessary in deciding whether the participants in a declassified program of scientific research are "intelligence sources" within the meaning of section 403(d)(3).

3. The hearings and reports which produced the CIA Information Act undermine the Agency's arguments in still another respect, by making it clear that the "intelligence sources" whom Congress wishes to protect do not include the sort of scientific researchers whose identities are at issue in this case. To the contrary, the legislative history of the CIA Information Act, just like the legislative history of the National Security Act cited by the CIA in its brief, contains no hint that these researchers qualify as intelligence sources. Instead, it is replete with references to the problems of "agents in the Soviet Union [and] in other parts of the world," House Intelligence Hearing at 16, to "our allies and individuals abroad who risk their lives," House Intelligence Hearing at 3, to "those who risk their lives and livelihoods," 130 Cong. Rec. S12396 (Sept. 28, 1984) (Sen. Goldwater), to "foreign sources," House Gov't Ops. Report at 8, and to "CIA sources abroad." Cong. Rec. H9629 (Sept. 17, 1984) (Rep. Stump). *See also* House Intelligence Report at 20-21 ("sensitive human and technical intelligence activities"). Thus, whatever the precise scope of the term "intelligence

sources" may be, it surely does not encompass the domestic scientific researchers who conducted the MKULTRA program, or the universities at which the research was performed.

CONCLUSION

For these reasons, the writ should be dismissed because the intervening change in the National Security Act eliminates the problem which justified issuance of the writ. Alternately, the decision below should be affirmed insofar as it pertains to the identities of the principal researchers and reversed insofar as it pertains to the institutions.

Respectfully submitted,

PAUL ALAN LEVY
(Counsel of Record)
ALAN B. MORRISON
DAVID C. VLADECK
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Respondents-Petitioners

October, 1984

No. 83-1249

(5)

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN CARY SIMS AND
SIDNEY M. WOLFE, PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ROBERT E. KOPP
LEONARD SCHAITMAN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

STANLEY SPORKIN
General Counsel

EDWARD PAGE MOFFETT
Assistant General Counsel
Central Intelligence Agency
Washington, D.C. 20505

17 pp

QUESTION PRESENTED

Whether the Freedom of Information Act requires the Director of Central Intelligence to disclose the institutional affiliations of scientific researchers whose identities are exempt from disclosure because they are intelligence sources, when the Director has reasonably determined that disclosure of the institutional affiliations would create an unacceptable risk of revealing the researchers' identities.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1249

JOHN CARY SIMS AND
SIDNEY M. WOLFE, PETITIONERS

v.

CENTRAL INTELLIGENCE AGENCY
AND WILLIAM J. CASEY,
DIRECTOR OF CENTRAL INTELLIGENCE

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 709 F.2d 95. The opinions and order of the district court (Pet. App. 21a-34a) are unreported. An earlier opinion of the court of appeals (Pet. App. 35a-64a) is reported at 642 F.2d 562. One of the earlier opinions of the district court

---

[1] "Pet. App." refers to the appendix to the petition in No. 83-1075.

(Pet. App. 73a-93a) is reported at 479 F. Supp. 84; the other earlier opinions and orders of the district court (Pet. App. 66a-72a, 94a-97a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 1983 (Pet. App. 19a-20a). A petition for rehearing was denied on August 17, 1983 (Pet. App. 17a). On November 9, 1983, the Chief Justice extended the time in which to file a petition for a writ of certiorari in No. 83-1075, which seeks review of the same judgment of the court of appeals, to December 15, 1983. On December 5, 1983, the Chief Justice further extended the time in which to file a petition for a writ of certiorari to December 29, 1983. The petition in No. 83-1075 was filed on that date and was granted on March 5, 1984. The cross-petition, No. 83-1249, was filed on January 27, 1984, and was granted on June 11, 1984. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

The facts and background of this case are recounted in our brief in No. 83-1075 (83-1075 Gov't Br. 2-11). Cross-petitioners filed suit under the Freedom of Information Act (FOIA), 5 U.S.C. 552, seeking, among other things, the names of private researchers who performed research for the Central Intelligence Agency in connection with a CIA project known as MKULTRA. Research for this project was performed by many individuals affiliated with institutions such as universities; cross-petitioners sought the names of both the individuals and the institutions.

In response, the CIA invoked Exemption 3 of the FOIA, which provides that an agency need not disclose "matters that are * * * specifically exempted from disclosure by statute * * * provided that such statute * * * refers to particular types of matters to be withheld" (5 U.S.C. 552(b)(3)(B)). The statute on which the CIA relied is Section 102(d)(3) of the National Security Act of 1947, which provides in part that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). The Agency's position is that the researchers are "intelligence sources" and therefore exempt from disclosure under Exemption 3 and 50 U.S.C. 403(d)(3).

The United States District Court for the District of Columbia initially rejected the Agency's Exemption 3 claim (Pet. App. 77a-79a). The court of appeals subsequently vacated the district court's ruling, propounded a definition of "intelligence sources," and remanded for reconsideration in light of that definition (*id.* at 35a-64a). The court of appeals' definition was as follows (*id.* at 50a):

> [A]n "intelligence source" is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it.

On remand, the district court ordered the disclosure of the names of about half of the individual researchers and the institutions with which they were affiliated (Pet. App. 21a-34a). The district court held that the identities of the other researchers were exempt from disclosure either because they had sought and received express promises of confidential-

ity from the Agency (*id.* at 26a) or because they had engaged in other intelligence activities, apart from MKULTRA, for the CIA (*id.* at 31a). The district court also ruled that the Agency need not disclose the institutional affiliations of the individual researchers whose identities were exempt from disclosure (*id.* at 27a, 34a).

Both sides appealed, and the court of appeals reversed in part and affirmed in part (Pet. App. 1a-11a). The court of appeals stated that "[a]lmost all of the District Court's various rulings were judicious and proper" (*id.* at 3a). But the court of appeals faulted the district court for focusing on whether researchers had received promises of confidentiality; the court of appeals stated that "[p]roof that the CIA did or did not make promises of secrecy (either express or tacit) to specific informants * * * [cannot] be dispositive of the question whether a given informant qualifies as an 'intelligence source'" (*id.* at 6a). The court of appeals entered an order reversing "the District Court's determination regarding which of the individual researchers satisfy the 'need-for-confidentiality' portion of the [court of appeals' definition] of 'intelligence source'" but affirming "[a]ll other aspects of the [district] court's decision" (*id.* at 11a).

The question in No. 83-1075 is whether the court of appeals' definition of "intelligence sources" is correct. The question in this case is whether the court of appeals erred in affirming the district court's ruling that the Agency is not required to disclose the institutional affiliations of the individual researchers whose identities are exempt from disclosure.

SUMMARY OF ARGUMENT

In carrying out his responsibility under 50 U.S.C. 403(d)(3) to "protect[] intelligence sources and methods from unauthorized disclosure," the Director of Central Intelligence must do more than simply withhold the names of intelligence sources; he must also prevent the disclosure of apparently innocuous information if it would enable an observer—such as a hostile foreign intelligence service—to infer the identity of a source. Here, the Director determined that disclosing the institutional affiliations of the MKULTRA researchers would create an unacceptable risk that individual researchers' identities would be discovered. The district court and the court of appeals upheld the Director's decision, and their concurrent determination is supported by the record. Indeed, common sense alone dictates that it was reasonable for the Director to conclude that disclosure of the researchers' institutional affiliations might lead to disclosure of their identities; even cross-petitioners do not deny this. There is, accordingly, no reason for this Court to reconsider this fact-bound issue.

Cross-petitioners suggest that the Director's decision to release the names of the institutions that consented to disclosure somehow estops him from withholding the names of the other institutions. Such an approach is inconsistent with the purposes of both the Freedom of Information Act and the protections afforded to the CIA; it would have the perverse effect of discouraging the Director from making disclosures of information even when he determines that a disclosure is in the national interest.

ARGUMENT

THE DIRECTOR OF CENTRAL INTELLIGENCE IS NOT REQUIRED TO DISCLOSE THE INSTITUTIONAL AFFILIATIONS OF MKULTRA RESEARCHERS WHO ARE INTELLIGENCE SOURCES

1. The Director of Central Intelligence is responsible for "protecting intelligence sources and methods from unauthorized disclosure" (50 U.S.C. 403(d)(3)). In exercising this authority granted by Congress, the Director must, of course, do more than simply withhold the names of intelligence sources, precise descriptions of intelligence methods, and similar information that would enable even a casual observer immediately to identify an intelligence source or method. Many of those observers from whom it is most important to "protect" intelligence sources and methods —such as hostile foreign intelligence services—must be presumed to have both the capacity to gather and analyze any information that is in the public domain and substantial expertise in deducing the identities of intelligence sources from seemingly unimportant details. See, *e.g.*, *Halkin* v. *Helms*, 598 F.2d 1, 9 (D.C. Cir. 1978), quoting *United States* v. *Marchetti*, 466 F.2d 1309, 1318 (4th Cir.), cert. denied, 409 U.S. 1063 (1972) (" 'What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context.' "); *Gardels* v. *CIA*, 689 F.2d 1100, 1106 (D.C. Cir. 1982), quoting *Halperin* v. *CIA*, 629 F.2d 144, 150 (D.C. Cir. 1980) (" '[E]ach individual piece of intelligence information, much like a piece of jigsaw puzzle, may aid in piecing together other bits of information even when the individual piece is not of obvious importance in itself'.").

Consequently, as cross-petitioners acknowledge (Br. 36), the Director, in exercising his authority under Section 403(d)(3) to protect intelligence sources, must sometimes withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. See *Gardels*, 689 F.2d at 1103-1104; *Halperin*, 629 F.2d at 147. And as cross-petitioners further recognize (Br. 38), the Director's decision that certain information must be withheld in order to protect an intelligence source should be given the greatest deference, in view of the Director's unique expertise and the magnitude of the government interests at stake. See *Halperin*, 629 F.2d at 148.

2. a. The basis of the district court's decision to permit the withholding of the institutional affiliations of the researchers whose identities were exempt from disclosure was that "disclos[ure of] the identities of the institutions * * * might lead to the indirect disclosure of" individual researchers (Pet. App. 27a).[2] This determination was supported by an affidavit, filed by a CIA operations officer familiar with MKULTRA, which stated that disclosure of the institutions at which MKULTRA research was performed would "threaten[en the] * * * exposure of past relationships with the institution[]" (J.A. 27).[3] Moreover, this

---

[2] Cross-petitioners agree that this was the basis of the district court's ruling on this point. See Br. 36. We note that we continue to believe that the institutions at which MKULTRA research was conducted are exempt from disclosure for the additional reason that they are themselves "intelligence sources." See Pet. App. 91a-92a.

[3] Oddly, cross-petitioners quote this affidavit (Br. 37) as evidence that the Agency did not make a judgment that disclosure of the institutions would also reveal the individual researchers. Cross-petitioners emphasize the fact that the

determination is plausible on its face and should have been upheld even if it lacked specific documentary support in the record: common sense dictates that it was reasonable for the Director to conclude that an observer who is knowledgeable about a particular intelligence project, like MKULTRA, could, upon learning that research was performed at a certain institution, often deduce the identities of the individual researchers. Since the Director's determination was reasonable and was upheld by both the district court and the court of appeals, there is no reason for this Court to reconsider it.

b. Cross-petitioners never deny that the Director could reasonably conclude—especially in light of the very great degree of deference that should be accorded to his determinations—that withholding institutional affiliations was necessary to protect the identity of individual researchers from unauthorized disclosure. Indeed, cross-petitioners have offered no explanation for their own effort to learn the institutional affiliations except that they want "to identify the [individual] researchers, talk to them, and * * * undertake further independent analysis to determine what they did" (Br. 5).

Cross-petitioners' principal argument in favor of overturning the concurrent determination of the courts below is, instead, that the CIA did not introduce sufficient affidavits supporting its decision to

---

affidavit speaks of relationships "with the institution[]" and seem to be suggesting that the Agency was not concerned about the exposure of relationships with individuals at the institution. But a relationship with an institution is necessarily a relationship with individuals at the institution; to be concerned about the exposure of a relationship with an institution is necessarily to be concerned about the exposure of a relationship with individuals affiliated with the institution.

withhold the institutional affiliations. See Br. 36-38. But the sufficiency of the Agency's affidavits is primarily a matter for the trial court to determine, subject to the review of the court of appeals. That is particularly true in a case like this, where the focus of the litigation frequently shifted and the governing law was altered by the court of appeals during the course of the protracted litigation. In any event, as we noted, the Agency's position was in fact supported by an affidavit and could have been upheld even if it was not, since it was manifestly reasonable and in accord with common sense.

c. Cross-petitioners also appear to suggest that because the Agency has already revealed the names of many of the institutions at which MKULTRA research was performed, it is somehow estopped from withholding the names of the others. See Br. 37-38. This suggestion is affirmatively mischievous and potentially damaging to both the CIA's mission and the objectives of the Freedom of Information Act.

During congressional and other inquiries into MKULTRA, then Director of Central Intelligence Turner notified the 80 institutions at which MKULTRA research had been conducted (see Pet. App. 39a). Many of these institutions had not previously been officially advised of their involvement, and as Director Turner explained in an affidavit, he notified them as part of "a course of action [designed to] lead to the identification of any unwitting experimental subjects" (*id.* at 92a n.1). In addition, the notification enabled the institutions to determine the scope of their involvement and to protect their reputations against unwarranted accusations based on rumor and speculation about MKULTRA research. See *Project MKULTRA, the CIA's Program of Re-*

search in Behavioral Modification: Joint Hearing Before the Select Comm. on Intelligence and the Subcom. on Health and Scientific Research of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 36-38 (1977). Many of these institutions disclosed their involvement to the public, and others advised the CIA that they had no objection to public disclosure. In the interests of furthering public understanding of MKULTRA, Director Turner then disclosed the names of these institutions to the public. He did not disclose the names of any institutions that objected to disclosure. See Pet. App. 39a, 73a-74a.

Congress did not mandate the withholding of information that may reveal the identity of an intelligence source; it made the Director responsible only for protecting against *unauthorized* disclosures. The national interest sometimes makes it advisable, or even imperative, to disclose information that may lead to the identity of intelligence sources. Director Turner, in making a related point, mentioned a well-known example in his affidavit (Pet. App. 90a):

> [D]uring the Cuban missile crisis, President Kennedy decided to release a great deal of sensitive intelligence information concerning Soviet missile installations in Cuba. It was clear, at that time, that the Soviets had to be told publicly that the United States government had precise information on the extent of the Soviet threat in order to justify the strong countermeasures then taken by our Government.

Director Turner similarly decided that the benefits of disclosing the identities of institutions that had no objection to disclosure outweighed the costs of doing so. But the fact that he made that determination in 1978 (*id.* at 39a) does not bind his successors to make

the same determination, in a different context, with respect to institutions that have requested the Director *not* to disclose their identities. See, *e.g.*, *Salisbury* v. *United States*, 690 F.2d 966, 971 (D.C. Cir. 1982); *Halkin*, 598 F.2d at 9.

When the Director of Central Intelligence (or the President) decides whether a disclosure of sensitive information bearing on the intelligence-gathering process will serve the national interest, he must weigh a variety of complex factors, many of which will require the assessment of other secret information or the use of his informed judgment about foreign affairs or, for example, the role of an intelligence agency in a democratic society. It would be inappropriate for a court to attempt to decide whether a decision to disclose information, based on such factors, is somehow inconsistent with a subsequent decision to withhold information that appears to be similar. Moreover, under cross-petitioners' approach, the Director would always have to consider the possibility that the disclosure of certain information will prejudice efforts to withhold superficially similar information in the future. The inevitable result would be less disclosure even in instances where the Director would otherwise consider disclosure to be in the national interest. This result benefits no one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

ROBERT E. KOPP
LEONARD SCHAITMAN
Attorneys

STANLEY SPORKIN
General Counsel

EDWARD PAGE MOFFETT
Assistant General Counsel
Central Intelligence Agency

NOVEMBER 1984

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 461531 10081